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ABSTRACT

Judicial decisions affecting educational policy and management that were handed down in 1993 by state and federal courts are summarized and analyzed in this book. The analyses are divided into nine topical chapters: (1) "Employees" (Ralph D. Mawdsley); (2) "Bargaining" (Charles J. Russo); (3) "Pupils" (Henry S. Lufler, Jr.); (4) "Individuals with Disabilities" (Allan G. Osborne, Jr.); (5) "Torts" (William J. Evans, Jr.); (6) "Sports" (Linda A. Sharp); (7) "Higher Education" (Robert M. Hendrickson); (8) "Education Related" (Mary Jane Rapport and Stephen B. Thomas); and (9) "Federal and State Legislation" (Dixie Snow Huefner). The book includes a 14-page alphabetical index of cases cited in the text as well as a 6-page subject index. (MLF)

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THE YEARBOOK OF EDUCATION LAW 1994

STEPHEN B. THOMAS

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THE YEARBOOK
OF
EDUCATION LAW
1994

Edited by

STEPHEN B. THOMAS

KENT STATE UNIVERSITY

NATIONAL ORGANIZATION ON
LEGAL PROBLEMS OF EDUCATION
TOPEKA, KANSAS

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Introduction

Approximately 200 cases involving pre-collegiate public sector education were reported last year. Although the United States Supreme Court ruled in a number of cases related to education this past year, none of the cases was relevant to the subject of this chapter. However, past Supreme Court decisions are noted where they are relevant to current cases. In identifying cases to be included in this chapter, cases that would more properly be the subject of other chapters in the *Yearbook* were excluded, as were cases that focused primarily on procedural matters. As has consistently been the case over past years, the sections with the largest number of reported cases were dismissal, nonrenewal, demotion, and discipline, with many cases concerning school board compliance with district and state policies.

Discrimination in Employment

Claims involving discrimination can arise under state or federal law, but the overwhelming number of cases in this chapter have litigated rights under federal statutes. The most prominent statute continues to be title VII of the Civil Rights Act of 1964.[1] Title VII prohibits both public and private educational institutions from discriminating on the basis of race, color, religion, sex, and national origin. Religious institutions have statutory exemptions under title VII where religion is a bona fide occupational qualification (bfoq) or the institution is church controlled. Discrimination on the basis of disability has become a major issue in society with the passage of the Americans with Disabilities Act (ADA).[2] Although no cases have yet arisen under the ADA, cases continue to be brought under section 504 of the Rehabilitation Act of 1973 which prohibits discrimination against "otherwise qualified handicapped individuals."[3] In addition, gender-based discrimination, including sexual harassment, is prohibited by title IX of the Educational Amendments of

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[1] 42 U.S.C. § 2000 *et seq.*
[2] 29 U.S.C. § 706; 42 U.S.C. § 12101 *et seq.*
[3] 20 U.S.C. § 794 *et seq.*

1972[4] and gender-based wage discrimination is prohibited by the Equal Pay Act of 1963.[5] Discrimination against employees forty or older is prohibited by the Age Discrimination in Employment Act of 1973 (ADEA).[6] Discrimination based on national origin and race is prohibited by section 1981 of the Civil Rights Act of 1866.[7] Discrimination complaints can also be pursued under section 1983 of the Civil Rights Act of 1871 which protects constitutional and statutory rights.[8]

Some discrimination cases involve fact situations that do not fit into one of the categories in this section. These cases can arise under state or federal law. The Pennsylvania Veteran Preference Act provides that a veteran possessing "requisite qualifications" for a position is entitled to preference for that position. In a case arising under that Act, a veteran, as long as he fulfilled state-mandated requirements and possessed a certificate to teach in the area involved, had an absolute preference for appointment as a teacher and the school district could not defeat the purpose of the Act by recognizing other requisite qualifications beyond those established by the Commonwealth.[9] A school district's collective bargaining provision prohibiting duplicate health insurance coverage for its married employees discriminated on the basis of marital status in violation of Wisconsin's Fair Employment Act. Not all employees with duplicate insurance were treated the same, as only married employees had to choose between the district's policy or that provided by a spouse's employer.[10] In a case arising under federal law, a school board's leave policies in a collective bargaining contract did not discriminate against pregnant teachers under title VII by precluding pregnant teachers from using accumulated paid sick leave followed by unpaid maternity leave, because nonpregnant teachers were treated the same. However, the sick leave policy discriminated against pregnant teachers in violation of title VII insofar as it automatically excluded withdrawals for maternity benefits as sole nonelective medical disability and gave school board discretion to consider all illnesses.[11]

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[4] 20 U.S.C. § 1681 *et seq.*

[5] 29 U.S.C. § 206(d)(1).

[6] 42 U.S.C. § 1601 *et seq.*

[7] 42 U.S.C. § 1981.

[8] 42 U.S.C. § 1983.

[9] Brickhouse v. Spring Ford Area Sch. Dist., 625 A.2d 711 (Pa. Commw. Ct. 1993).

[10] Braatz v. Labor and Indus. Rev. Comm'n, 496 N.W.2d 597 (Wis. 1993).

[11] United States v. Board of Educ. of the Consol. High Sch. Dist. 230, Palos Hills, Ill., 983 F.2d 790 (7th Cir. 1993).

Race

The cases were approximately evenly split as to whether claimants were able to state causes of action for discrimination based on race. A black male bus driver who was decertified by a school board for binding the hands of a disruptive special education student on the bus, stated a prima facie case under title VII when a white escort and an Hispanic escort had been disciplined less harshly for apparently similar conduct.[12] A black applicant not hired for a high school teaching position stated a cause of action for race discrimination under title VII.[13] An unfavorable recommendation received by the board of education from the principal of the school where the applicant had previously worked, was not shown to be a "legitimate nondiscriminatory reason for not hiring the plaintiff."[14] A white head football coach who was terminated after drinking two cans of beer alone in his room, stated a section 1983 cause of action that race was a motivating factor in his dismissal where it was apparent that the school board considered the white coach's dismissal in light of the recent dismissal of a black teacher.[15]

However, other claimants were not successful. Black teachers who had been discharged after failing the Texas teacher competency test failed to state claims under title VI, title VII, the Equal Educational Opportunities Act, and the due process and equal protection provisions of the Fourteenth Amendment. The raising of the cutoff score did not show an intent to discriminate for purposes of disparate impact, as all teachers were required to take the test, and there was only a discrepancy of four and one-half percentage points between the passing rates of white and black teachers.[16] A black female special education teacher failed in her section 1983 claim against her supervisors and the school board on the grounds of race and gender discrimination. The supervisors were not liable because the plaintiff presented no evidence that the supervisor had played a role in the discrimination. The school board was not liable because the plaintiff presented no evidence of a custom or usage to discriminate.[17] A jury verdict on behalf of a discharged white male school custodian on the basis of race discrimination was reversed on appeal because the custodian had failed to establish that race had been the motivating factor at the time the employment decision had been made.[18] An African-American school bus driver dismissed for failing to take a drug test failed to state a claim under title VII.[19] The court reasoned that under state statutes and, "[f]or the safety of Indiana's children, school authorities may at any time demand that a driver submit to a physical exam."[20]

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[12] Hill v. New York City Bd. of Educ., 808 F. Supp. 141 (E.D.N.Y. 1992).

[13] Roberts v. Houston County Bd. of Educ., 819 F. Supp. 1019 (M.D. Ala. 1993).

[14] *Id.* at 1029 (emphasis in original).

[15] Wilkerson v. Columbus Separate Sch. Dist., 985 F.2d 815 (5th Cir. 1993).

[16] Frazier v. Garrison I.S.D., 980 F.2d 1514 (5th Cir. 1993).

[17] Long v. Board of Educ. of Philadelphia, 812 F. Supp. 525 (E.D. Pa. 1993).

[18] Koszor v. Ferguson Reorganized Sch. Dist. R-2, 849 S.W.2d 205 (Mo. Ct. App. 1993).

Religion

In an interesting case involving a deaf interpreter's refusal on religious grounds to interpret literally words of profanity, the Missouri Court of Appeals upheld the interpreter's discharge. Accommodating the interpreter's religious beliefs would have compromised the deaf students' entitlement to a full education and would have required the district either to allow the interpreter to act as a censor or to bring in other interpreters to translate the offensive words.[21] In a nonpublic school case, a Protestant-only employment requirement for teachers in a religious Hawaiian school was held not to be protected under title VII exemptions for bfoq or because the school was a religious organization. (The school was found not to be church controlled).[22]

Sex

Claimants were generally successful in stating causes of action on the basis of sex. A female custodian who was paid a wage lower than male custodians stated a prima facie violation of the Equal Pay Act when the employer sought to equalize the pay rates by lowering the wages of male employees.[23] As a matter of law, gender-based animus may support a cause of action under section 1985(3) of the civil rights statute authorizing a civil conspiracy claim. Thus a teacher whose job description had been revised allegedly to cover up gender discrimination claimed that the school board and its individual members conspired to intentionally deprive the teacher of due process and equal protection on the basis of gender.[24] Where a female educator had been denied promotion to a secondary school position, a federal district court can use its broad equitable discretion to prohibit the school district from filling any position for which the plaintiff might be qualified without first securing permission of the court.[25] A female employee who had quit her job because of sexual harassment was entitled to unemployment compensation even though she failed to notify her employer of the supervisor's harassment before she quit.[26] The employer was chargeable with the benefits because it did not have an adequate process to inform employees of the procedures to be used if they were to experience harassment.[27] In a significant nonpublic school case, a California federal district court ruled that discharge of a librarian in a religious school after she had become pregnant out of wedlock could establish a title VII violation since only women could ever be fired for being pregnant without benefit of marriage.[28]

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[19] Atkins v. Board of Sch. Comm'rs of Indianapolis, 830 F. Supp. 1169 (S.D. Ind. 1993).

[20] *Id.* at 1176.

[21] Sedalia #200 Sch. Dist. v. Missouri Comm'n on Human Rights, 843 S.W.2d 928 (Mo. Ct. App. 1992).

[22] EEOC v. Kamehameha Sch./Bishop Estate, 990 F.2d 458 (9th Cir. 1993).

[23] EEOC v. Romeo Community Schs., 976 F.2d 985 (6th Cir. 1992).

[24] Larson v. School Bd. of Pinellas County, Fla., 820 F. Supp. 596 (M.D. Fla. 1993).

[25] Hicks v. Dothan City Bd. of Educ., 814 F. Supp. 1044 (M.D. Ala. 1993).

A school district prevailed in a case involving gender discrimination. In countering a discharged teacher's gender discrimination complaint, introduction of a principal's logbooks containing alleged parental complaints registered against the plaintiff did not constitute hearsay.[29] The evidence was not admitted to prove that the parents complained about the teacher's teaching, but rather was admitted to prove the state of mind of the school district (i.e., that gender was not a motivating factor in the district's decision not to renew the teacher's contract).[30] A female worker not rehired for a position failed to establish a hostile work environment sexual harassment claim.[31] Part of plaintiff's failure to succeed depended on her erosion of credibility reflected by her having lied on various occasions during the course of her employment about several facts material to the district's decision to hire her, and its decision to continue her employment.[32]

Age

Cases were split concerning the success of claimants alleging age discrimination against school districts. A teacher whose working conditions had been made intolerable by an intense pattern of classroom observation, criticism, and evaluation over an eight-month period was considered to have been constructively discharged. The school board president's awareness of legal problems attendant to firing an older teacher in order to replace him with a less expensive younger teacher, together with evidence that the older teacher had been discharged without legitimate reasons, amounted to a submissible case on willfulness in the teacher's ADEA lawsuit.[33] A school district was denied summary judgment with regard to whether its articulated reason for precluding teachers sixty years of age and older from taking advantage of a regulation permitting automatic renewal of certificates was pretextual. Apparently, the district allowed recently graduated teachers to renew their certificates, and did not apply the same policies to all "automatic renewal" regulations.[34]

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[26] Allen v. Department of Employment and Training, 618 A.2d 1317 (Vt. 1992).

[27] *Id.* at 1320.

[28] Vigars v. Valley Christian Ctr. of Dublin, Cal., 805 F. Supp. 802 (N.D. Cal. 1992).

[29] Cameron v. Board of Educ. of Hillsboro City Sch. Dist., 820 F. Supp. 336 (S.D. Ohio 1993).

[30] *Id.* at 337.

[31] Locastro v. East Syracuse-Minoa Cent. Sch. Dist., 830 F. Supp. 133 (N.D.N.Y. 1993).

[32] *Id.* at 138.

[33] Lee v. Rapid City Area Sch. Dist. No. 51-4, 981 F.2d 316 (8th Cir. 1992).

School districts were successful in a number of cases. A school cashier, discharged by the school district for failing to keep adequate records of cafeteria funds, did not establish that the district's reason was pretextual where her only evidence was her own affidavit that she had been terminated by the principal because of inconsistent figures on her weekly reports and that she had been replaced by a woman in her twenties.[35] A fifty-nine-year-old teacher intern, whose one-year substitute teacher probationary contract was not renewed, failed to state a prima facie case for age discrimination where her replacement was also fifty-nine. A comment by the intern's supervising teacher that the intern was old enough to be her mother did not create a genuine issue of fact to oppose granting summary judgment for the school district.[36] A boiler operator, whose ADEA age discrimination claim had been dismissed by a federal court, could not later recover under state causes of action.[37] Res judicata applied as to the school district, the state, and a supervisor and department head at the school. The defendants were entitled to summary judgment in the state court because they had proved the essential elements of res judicata: (1) a final judgment on the merits in the earlier action; (2) an identity of the cause of action in the prior action and the present action; and (3) an identity of the parties or privies in the two suits.[38]

National Origin

The cases were divided regarding successful discrimination claims on the basis of national origin. Establishing a prima facie case is an important step in national origin discrimination as in all areas of discrimination. A technical institute instructor of Pakistani origin whose contract had not been renewed, failed to state a title VII prima facie case because no one had been hired to replace him.[39] On the other hand, a requirement by Puerto Rico that the teacher certification exam be administered only in Spanish presented a possible equal protection violation.[40] The plaintiff, who spoke only English and was thus "a member of a minority language group in the context of Puerto Rico," may have been the victim of arbitrary discrimination based on monolingualism. "The use of one's language is an important aspect of one's ethnicity, and should not be sacrificed to government or business interests without good cause."[41] Prior to trial on the discrimination issue, the defendants agreed to issue the plaintiff a permanent teacher's license.

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[34] Ross v. Unified Sch. Dist. No. 231, Johnson County, Kan., 807 F. Supp. 678 (D. Kan. 1992).

[35] White v. Houston Indep. Sch. Dist., 815 F. Supp. 1016 (S.D. Tex. 1993).

[36] Gallant v. Toledo Pub. Sch., 616 N.E.2d 1156 (Ohio Ct. App. 1992).

[37] Brown v. Osier, 628 A.2d 125 (Me. 1993).

[38] *Id.* at 127.

[39] Durrani v. Valdosta Technical Inst., 810 F. Supp. 301 (M.D. Ga. 1992).

However, a school district can prevail by demonstrating that differences in treatment resulted from nondiscriminatory reasons. A Mexican-American teacher, who had resigned her position, alleged a wide range of discriminatory treatment (e.g., racial slurs, racist evaluations, denial of advance notice of layoffs, denial of sabbatical, and exclusions from department meetings and communications), but failed to sustain a cause of action under title VII because defendant school district had nondiscriminatory reasons for all of plaintiff's claims. In certain claims such as the denial of a sabbatical, the school district was able to prove that an exception granted to a white male seven years earlier was different from the plaintiff's situation because plaintiff's reason for sabbatical was postponeable whereas the white male's reasons had not been.[42]

Disability

Employees alleging discrimination based on disability must fit within the definition of a person with a disability. A teacher who was allergic to a particular fungus did not state a "record of impairment" so as to give her a cause of action under section 504.[43] In a case of some importance in relating disability to standardized testing (NTE), a Virginia federal district court found that a teacher who allegedly suffered from a learning disability in the form of attention deficit disorder in auditory modality failed to show an impairment substantially limiting a major life activity and thus did not have a disability.[44] Even if the condition qualified as a disability, unlimited time to take the NTE was not a reasonable accommodation "because similar modifications could not be expected in the job of teaching."[45] In addition, the teacher was not "otherwise qualified" as a result of her failure to pass the communication skills part of the NTE. "The ability to read intelligently, to comprehend written and spoken communication accurately, effectively and quickly, and to respond to written and spoken communication professionally, effectively and quickly, are 'essential functions' of a special education, public school teacher in Virginia."[46] In a case under Nebraska's Fair Employment Practice Act, an employer did not violate the Act in discharging an employee after she did not return to work following a one-year medical leave provided in the collective bargaining agreement.[47] Application of terms of the collective bargaining agreement was "a legitimate, nondiscriminatory reason for her ultimate discharge."[48]

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[40] Smothers v. Benitez, 806 F. Supp. 299 (D.P.R. 1992).

[41] *Id.* at 309.

[42] Laffey v. Independent Sch. Dist. No. 625, 806 F. Supp. 1390 (D. Minn. 1992).

[43] Byrne v. Board of Educ., Sch. of West Allis-West Milwaukee, 979 F.2d 560 (7th Cir. 1992).

[44] Pandazides v. Virginia Bd. of Educ., 804 F. Supp. 794 (E.D. Va. 1992).

[45] *Id.* at 803.

Some employees were able to prevail in their disability claims under federal and state law. In a case of first impression, the Seventh Circuit Court of Appeals ruled that a married female unable for biological reasons (polio) to give birth to a child stated a cause of action under the Rehabilitation Act when she was denied a child-care leave of absence to adopt a child comparable to that granted to females who gave birth to biological children.[49] The court found that "[c]hild-care leave is related to work in the relevant sense. The Rehabilitation Act calls for reasonable accommodations that permit handicapped individuals to lead normal lives, not merely accommodations that facilitate the performance of specific employment tasks."[50] In a case arising under Washington State statutes, a school counselor who had been hospitalized because of an asthmatic condition aggravated by smoke in her school stated a cause of action against the school district because it failed to provide her with a safe and healthful workplace. In addition, the court ruled that the three-year statute of limitations did not begin to run until after both the school district and the counselor knew that accommodation measures taken by the school district to alleviate the secondary smoke problem were unsuccessful.[51]

Substantive Constitutional Rights

The constitutional rights that are the subject of this section include the First Amendment right of freedom of speech, freedom of association, and the rights of those with liberty and property interests not to be treated by government in an arbitrary and capricious fashion, such as the right to substantive due process under the Fourteenth Amendment where state government was concerned, or under the Fifth Amendment where the federal government was concerned. As in past years, this section is dominated by free speech cases.

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[46] *Id.*
[47] Woodyard v. Hoover Group, Inc., 985 F.2d 421 (5th Cir. 1993).
[48] *Id.* at 425.
[49] McWright v. Alexander, 982 F.2d 222 (7th Cir. 1992).
[50] *Id.* at 227.
[51] Hinman v. Yakima Sch. Dist., 850 P.2d 536 (Wash. Ct. App. 1993).

Speech

Although plaintiffs prevailed in only about half of the reported cases, the central issue in most of the cases was the same—whether the speech involved a subject of public concern. Free speech rights can be asserted only by those who have a direct interest. An American history teacher who had given permission for students in her class to publish a newspaper separate from the one published by the journalism class lacked standing to assert free speech claims regarding the school principal's directive to shut down the paper.[52] The teacher's interest in the paper did not rise to the level of public concern because "she expressed concerns about censorship not to the administration or to the public, but only to students who completed the project."[53] In another case, a ten-year veteran teacher reacted to the school district's decision during an impending budgetary crisis to pay summer school teachers biweekly rather than in a lump sum by writing and circulating a method of payment, criticizing the school district for budgetary mismanagement, and encouraging teachers to engage in a "sick-out" during the week of final examinations.[54] The teacher was dismissed and the school board was granted summary judgment. In upholding the summary judgment, the Fourth Circuit Court of Appeals reasoned that even if the comments about pay and mismanagement were matters of public concern, they were outweighed by the public interest in having public education provided by teachers loyal to that service; by having final examinations proctored and completed in a timely fashion; and by the district's interest in having its employees abide by reasonable policies adopted to control sick leave, maintain morale, and provide effective operation of the schools.[55] In addition to the issue of public concern, free speech can also implicate the issue of public forum.

In an interesting case testing the free speech rights of teachers in the classroom, the First Circuit Court of Appeals has upheld a school district's decision not to rehire a nontenured teacher following a discussion in her ninth grade class concerning abortion of Down's Syndrome fetuses.[56] Citing to *Hazelwood School District v. Kuhlmeier*,[57] the court observed that a teacher's statements in class are part of the curriculum and a regular class activity, that the classroom is not a public forum, and that teachers are therefore subject to reasonable speech regulation.[58] An employee's free speech claims can also be unsuccessful where the school district has neutral reasons for discipline. In a case from the Fifth Circuit Court of Appeals, a teacher's action for damages based on academic freedom against a school board challenging her reprimand and transfer was dismissed. The school board's reasons of inadequate supervision, willful neglect, and violations of the school's financial policies were not rebutted by the teacher.[59]

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[52] Moody v. Jefferson Parish Sch. Bd., 803 F. Supp. 1158 (E.D. La. 1992).

[53] *Id.* at 1165.

[54] Stroman v. Colleton County Sch. Dist., 981 F.2d 152 (4th Cir. 1992).

[55] *Id.* at 159.

[56] Ward v. Hickey, 996 F.2d 448 (1st Cir. 1993).

[57] 484 U.S. 260 (1988).

A number of employees were successful in raising free speech claims. A nonrenewed principal who had spoken "forcefully and professionally" at a school board meeting against a state department of education waiver from an extended school year spoke on a matter of public concern. Because the principal's right to free speech with respect to matters of public concern was well-established, school board members were not entitled to qualified immunity to her section 1983 action.[60] A certified teacher who had been called in decreasing frequency as a substitute teacher, and who was not hired to fill one of seven full-time teaching positions, stated a cause of action that failure to hire her was in retaliation for her criticism of the quality of teachers in the public schools.[61] "Undoubtedly, speech regarding the quality of teachers in the public schools touches upon matters of public concern . . . . [Moreover], there is no indication that [the teacher's] complaints posed a threat to the efficient running of the schools . . . ."[62] A cafeteria worker presented sufficient evidence to go to trial on the issue of whether her contract had been nonrenewed because she had openly campaigned for the rival of an incumbent board member. The board had failed to produce evidence regarding letters of complaint concerning the worker's cleanliness and the decrease in the number of students using the lunchroom to refute the worker's claim that she had been discharged for her exercise of protected speech.[63] A University of Wisconsin associate professor had standing to bring a free speech challenge to the validity of Wisconsin's "gag rule" prohibiting agency employees from requesting from the state legislature appropriations exceeding the amount of the agency's most recent request, despite a claim that he had not suffered direct injury.[64] Based on the professor's affidavit, "the gag law [was] chilling speech."[65]

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[58] Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993).

[59] Moody v. Jefferson Parish Sch. Bd., 2 F.3d 604 (5th Cir. 1993).

[60] Carrillo v. Rostro, 845 P.2d 130 (N.M. 1992).

[61] Mazurek v. Wolcott Bd. of Educ., 815 F. Supp. 71 (D. Conn. 1993).

[62] *Id.* at 76.

[63] Durant v. Independent Sch. Dist. No. 16 of Leflore County, Okla., 990 F.2d 560 (10th Cir. 1993).

[64] Barnett v. Wisconsin Ethics Bd., 817 F. Supp. 67 (E.D. Wis. 1993).

[65] *Id.* at 70.

Association

The right of association can apply to an individual's marriage relationship or an individual's relationship to an organization. A school district superintendent could be sued in his individual capacity for damages under section 1983 for failure to renew the contract of the principal's secretary who also happened to be the principal's wife.[66] In this case, the superintendent had allegedly stated to the wife that he was nonrenewing her because he had a disagreement with her husband and was not able to fire him. The federal appeals court found that the wife had stated a claim for violation of her right of association even though the marriage relationship had not been damaged and reasoned that "[t]he right of association is violated if the action constitutes an undue intrusion into the marriage relationship."[67] The Department of Education of Puerto Rico, against which a prima facie case of political discrimination had been made, was entitled to rebut the charge with a "changeover" defense, which recognizes that certain actions taken after a changeover in administrations may be designed not to discriminate against political employees but to advance the new administration's First Amendment related concerns in implementing its interests. However, where the incoming administration does not eliminate jobs but instead merely removes the duties from one set of employees and gives them to another, the changeover defense provides no protection against a claim of political discrimination.[68] Teachers who prevailed on their section 1983 claims that their contracts had been nonrenewed because of the teachers' speech and associational activities were not, however, entitled to reinstatement.[69] The court noted that "in extraordinary circumstances . . . reinstatement may not be the appropriate remedy" and such was the case here where there was "extensive testimony about the tense and hostile atmosphere that existed at the school . . . ."[70]

Religion

A former teacher's aide lost in her claim that a school district had violated title VII and the First Amendment by not accommodating her hairstyles and headwraps which conflicted with the school district's dress code.[71] In examining the evidence, the court concluded that the aide had failed to communicate the religious nature of her beliefs to the district and that the explanation that she did provide was reflective more of

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66. Adkins v. Board of Educ. of Magoffin County, Ky., 982 F.2d 952 (6th Cir. 1993).
67. *Id.* at 956.
68. Agosto v. Aponte Roque, 800 F. Supp. 1033 (D.P.R. 1992).
69. Standley v. Chilhowee R-IV Sch. Dist., 5 F.3d 319 (8th Cir. 1993).
70. *Id.* at 322.
71. McGlothin v. Jackson Mun. Separate Sch. Dist., 829 F. Supp. 853 (S.D. Miss. 1992).

African culture. The court then observed that "culture" did not equate with "religion" for title VII purposes.

Substantive Due Process

The cases in this section addressed the reasonableness of a school board practice and a state statute. In a case of some note, a tenured teacher accused of committing drug offenses on school property was held entitled to a preliminary injunction to prevent the school board from suspending him until after a hearing was held in compliance with applicable law concerning constitutional safeguards. At issue was whether the administrative hearing would impair the teacher's Fifth Amendment privilege against self-incrimination.[72] An Illinois statute that afforded extra tenure to special education teachers in joint agreement programs between districts met rationally advanced, reasonable, and identifiable governmental interests and did not violate equal protection guarantees by not affording the same protection to vocational educational teachers under joint agreements.[73]

Procedural Due Process

Except in the case of emergency suspensions with pay, the Constitution requires that employees who have "liberty" and "property" interests must be afforded procedural due process before adverse employment actions affecting those interests are implemented.[74] Although the type of due process provided will vary with the nature and severity of the anticipated consequences, the essence of due process is notice and a fair opportunity to respond to the charges.

Before it is determined that due process is required, it must be demonstrated that the employee had a legitimate claim of entitlement to a particular job. An employee "at will" has no legitimate claim of entitlement to a position, and neither does an employee who is simply rehired at the end of a term contract. An additional basis upon which to assert a claim to procedural due process arises when government action threatens to damage an employee's reputation, honor, integrity, or standing in the community, particularly if it may foreclose future employment opportunities.

The process due an employee may be stated in district policies, collective bargaining agreements, or state statutes. A probationary teacher who left her employment voluntarily in April 1989, but who alleged that she had been constructively discharged because of her superior's negative evaluations, was entitled to predisposition due process. However, a grievance procedure under the collective bargaining agreement satisfied the requirements of due process and thus the teacher was not deprived of her Fourteenth Amendment rights when she failed to utilize the available grievance procedure.[75] A school district requirement that a teacher on extended medical leave for mental impairment secure a second medical opinion before he would be permitted to return to teaching did not deprive the teacher of due process. The teacher had failed to file a grievance concerning the second opinion until a year after he had known about the requirement.[76]

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[72] Abshire v. Lafayette Parish Sch. Bd., 619 So. 2d 103 (La. Ct. App. 1993).

[73] Aken v. Board of Control of Lake County Area Vocational Ctr., 604 N.E.2d 524 (Ill. App. Ct. 1992).

[74] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

Liberty and Property Interests

Employees at will generally do not have property rights entitling them to procedural rights when their employment is terminated. In a case decided under New York's Civil Service Law, a New York appellate court determined that an unclassified at will chairperson of a subcommittee on special education who was reduced to the position of educational evaluator lacked a constitutionally protected property interest and was not therefore entitled to a pretermination hearing.[77]

A principal who was suspended with pay for approximately two months prior to being transferred to another school was not deprived of a protectable property interest. Since the employment contract was written as a general exchange of employment for consideration, the principal lacked a property interest under Wisconsin law which did not recognize a constitutionally protected right to go to work.[78]

Property interests frequently are created by collective bargaining agreement or state statutes. A maintenance employee against whom criminal charges of sexual abuse of his daughter had been dismissed had a property interest to his job through his collective bargaining agreement and could not be terminated without a just cause hearing.[79] In interpreting the Term Contract Renewal Act, the Texas Supreme Court determined that the Act creates a property interest for a nonrenewed teacher in a term contract. Thus, failure of a school board to provide reasons for nonrenewal, in violation of the Act, violated the teacher's due process rights.[80]

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[75] Ryan v. City of Augusta, 622 A.2d 74 (Me. 1993).

[76] Scheideman v. West Des Moines Community Sch. Dist., 989 F.2d 286 (8th Cir. 1993).

[77] *In re* Ragone, 600 N.Y.S.2d 89 (N.Y. App. Div. 1993).

[78] Terry v. Woods, 803 F. Supp. 1519 (E.D. Wis. 1992).

[79] Sublett v. District Sch. Bd. of Sumter County, 617 So. 2d 374 (Fla. Dist. Ct. App. 1993).

[80] Grounds v. Tolar Indep. Sch. Dist., 856 S.W.2d 417 (Tex. 1993).

A teacher may have a property interest simply by virtue of having a job. A tenured teacher who had permitted his teaching certificate to expire had a property interest in his job until terminated by the school board.[81] Termination of the teacher after expiration of the teaching certificate without providing a pretermination hearing violated the teacher's right to due process. The teacher, as the prevailing party in this section 1983 action, was entitled to attorney fees, but would not be entitled to back pay if he "would have been terminated even if an appropriate pretermination hearing had been held."[82]

Liberty interests address whether an employee has been stigmatized by employer treatment or allegations of wrongdoing. Dismissal of a football coach from his supplemental coaching contract for use of a racial epithet did not support a section 1983 claim that the school board's charge of immorality and willful and persistent violations of board rules resulted in the coach being stigmatized. A breach of contract action by a public employee does not give rise to a claim for denial of substantive due process.[83] A teacher discharged after having been convicted on two separate occasions for driving while intoxicated and for resisting arrest and driving without a valid driver's license was not deprived of a liberty interest when two board members later claimed that he was "immoral."[84] Since one of the reasons found by the board for the discharge was immorality, and the teacher had received a due process hearing before the board where he had an opportunity to contest the charges, his liberty interest in his good name had been adequately protected. A letter sent to parents regarding a disruptive incident resulting in a probationary principal being suspended with pay pending an investigation, and with her contract eventually being nonrenewed, was not stigmatizing.[85] None of the statements in the letter suggested dishonesty or immorality, and at worst raised questions about the principal's judgment and professional incompetence. "[D]ischarge on grounds of poor performance, poor judgment, incompetence, unsatisfactory performance, or even insubordination is not stigmatizing."[86] A former teacher and athletic coach was not deprived of a liberty interest when a school district failed to rehire him after he voluntarily resigned after failing to obtain state-required certification.[87] In this case, the plaintiff failed to show that the reasons for not rehiring him were stigmatizing or that he was unable to obtain employment with another school district.

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[81] Cotton v. Reynolds, 812 F. Supp. 121 (E.D. Tenn. 1992).

[82] *Id.* at 124.

[83] Holthaus v. Board of Educ., Cincinnati Pub. Schs., 986 F.2d 1044 (6th Cir. 1993).

[84] Vukadinovich v. Board of Sch. Trustees of Mich. City Area Schs., 978 F.2d 403 (7th Cir. 1992).

[85] Johnson v. Independent Sch. Dist. No. 281, 494 N.W.2d 270 (Minn. 1992).

[86] *Id.* at 275.

[87] Nelson v. Payne, 827 F. Supp. 1273 (S.D. Tex. 1992).

Occasionally, both property and liberty interests can be implicated in the same case. A substitute teacher whose name had been removed from the school district's substitute teacher list for yelling at students and for using profanity and pinching students lacked a property interest under Texas law.[88] The reasons for the plaintiff's termination were not made public and were not revealed until he signed a background release form as part of a police department application. In rejecting the plaintiff's liberty interest violation, the court observed that "[i]f the reasons for plaintiff's discharge were not made public and he can still seek employment elsewhere, his liberty interest has not been violated."[89]

Aspects of Notice

Notice generally refers to the right of an employee to receive a statement of reasons prior to dismissal and to the nature of a hearing. Not all employees are entitled to notice. A school nurse whose contract had been nonrenewed was not entitled to notice and a hearing under the Texas Term Contract Nonrenewal Act. Her job did not meet the requirements of a "full-time professional employee" under the Act nor was her registration with the State Board of Nurse Examiners a "certificate" within the meaning of the Act.[90]

Many situations may require that notice be provided and where that notice has not been provided the employee may be entitled to financial compensation. A tenured New York teacher whose pay had been terminated during disciplinary proceedings for allegedly seeking numerous, unnecessary adjournments to disciplinary proceedings, was entitled to notice or an opportunity to be heard prior to termination.[91] In an interpretation of its state tenure statute, the Kansas Supreme Court decided that when a school board gives a tenured teacher statutory notice of intent to nonrenew the teacher's contract, the contract terminates at the end of the contract year, subject to due process rights of the teacher to receive a pretermination hearing. The teacher in this case was entitled to a writ of mandamus to compel payment of his salary until the end of the contract year or until granted a pretermination hearing.[92] A nonprobationary state employee who was not provided with the pretermination notice of reasons prior to discharge required under *Cleveland Board of Education v. Loudermill*[93] was entitled to a jury award of $150,000 for lost wages, impairment of future earning capacity, and emotional distress.[94]

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[88] Jones v. Houston Indep. Sch. Dist., 805 F. Supp. 476 (S.D. Tex. 1991).

[89] *Id.* at 478.

[90] Dodd v. Meno, 857 S.W.2d 575 (Tex. Ct. App. 1993).

[91] McCreery v. Babylon Union Free Sch. Dist., 827 F. Supp. 136 (E.D.N.Y. 1993).

[92] McMillen v. U.S.D. No. 380, Marshall County, Kan., 855 P.2d 896 (Kan. 1993).

[93] 470 U.S. 532 (1985).

Aspects of Hearing

The issues litigated in this section included whether a dismissed employee is entitled to a pretermination hearing, whether a hearing should be postponed if criminal charges have also been filed, whether an employee can waive his right to cross examination, and whether a school board's hearing was unbiased. A bus mechanic terminated after his position had been abolished for economic reasons was not denied a due process right to a pretermination hearing.[95] "[D]ue process does not require a pretermination hearing in such a situation because the employee does not need an opportunity to present evidence on job performance."[96] The necessity of providing a hearing following nonrenewal of a teacher as coach and athletic director was nullified where the teacher had filed suit for wrongful discharge prior to expiration of the existing contract and the board had offered a new contract to the teacher without the stipend provided for coaching and for serving as athletic director.[97]

Concerning criminal charges based on the same set of facts as employee dismissal, a teacher charged with immoral conduct was denied due process when the school board refused to grant a continuance for its dismissal hearing until after a criminal action arising out of the same set of facts had been concluded.[98] Regarding the right of cross examination, a nonprobationary teacher charged with sexual molestation of female students on a field trip had waived his right to cross examine the girls, who had failed to appear at his hearing, when he did not object to their absence and inability to cross examine them.[99] "Even constitutional issues may be waived if they are not raised below."[100]

In determining whether a school board's decision in nonrenewing a coach's contract was unbiased, the standard to be applied in South Dakota is whether the record establishes actual bias or supports the position that there exists an unacceptable risk of bias or prejudgment. In this case, the teacher showed a violation of due process where a school[101] board member had offered his position to another person prior to the school board meeting, where a board member told another member that the teacher should not have been tenured, where the principal's contract was normally renewed in February, but this year was renewed in March after he changed his recommendation concerning the contract nonrenewal, and where a school board member questioned the teacher regarding why the board member's son did not make the varsity basketball team.[101]

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[94] Lee v. Giangreco, 490 N.W.2d 814 (Iowa 1992).

[95] Graham v. Triway Bd. of Educ., 610 N.E.2d 1185 (Ohio Ct. App. 1992).

[96] *Id.* at 1188.

[97] Hubbard v. Parker, 994 F.2d 529 (8th Cir. 1993).

[98] Clark v. Wentzville R-IV Sch. Dist., 848 S.W.2d 608 (Mo. Ct. App. 1993).

[99] Helena-West Helena Sch. Dist. v. Davis, 843 S.W.2d 873 (Ark. Ct. App. 1992).

[100] *Id.* at 875.

The appropriateness of a hearing panel's decision may be affected by circumstances that violate state law even though no actual bias may be present. A hearing panel's determination that a tenured teacher was guilty of insubordination had to be set aside and the teacher reinstated after the school board had paid compensation beyond that authorized by the tenure hearing statute to a member of the hearing panel.[102]

Dismissal, Nonrenewal, Demotion, and Discipline

This section deals with a broad range of issues, some of which relate to the prior section and concern evidentiary questions and the role of the hearing officer. A collective bargaining provision providing that teacher discipline be only for "just and sufficient cause" did not prohibit admission into evidence at a teacher's dismissal hearing of prior acts of misconduct.[103] Dismissal of a nonprobationary teacher satisfied the statutory "just cause" requirement where evidence for terminating the teacher included ineffective lesson plans, poor organization and planning, poor teaching techniques, inappropriate student supervision, failure to follow administrative direction on lesson plans, and failure to follow through on an assistance plan.[104] Evidence seized by police charging a tenured teacher with possession of marijuana could be used at the teacher's dismissal hearing despite the teacher's claim that the evidence had been seized in violation of the Fourth Amendment.[105] "[T]he question of whether evidence obtained in violation of the Fourth Amendment must be excluded requires the balancing of the societal costs against the deterrent benefits of excluding the evidence."[106] A determination as to whether an employee's discharge was due to job performance or to personality conflict with the supervisor was a question for the hearing officer and the hearing officer's decision to dismiss the employee will be upheld where he had been notified during three evaluations of his deficiencies.[107]

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[101] Riter v. Woonsocket Sch. Dist. No. 55-4, 504 N.W.2d 572, 574 (S.D. 1993).

[102] Syquia v. Board of Educ. of Harpursville Cent. Sch. Dist., 591 N.Y.S.2d 996 (N.Y. Ct. App. 1992).

[103] McCorkle v. Sunnyside Sch. Dist. No. 201, 848 P.2d 1308 (Wash. Ct. App. 1993).

[104] Board of Directors of the Starmount Community Sch. Dist., 498 N.W.2d 697 (Iowa 1993).

[105] *In re* Freeman, 426 S.E.2d 100 (N.C. 1993).

[106] *Id.* at 102.

[107] Rowley v. Board of Educ. of Gloversville Enlarged City Sch. Dist., 596 N.Y.S.2d 561 (N.Y. App. Div. 1993).

A number of cases dealt with the fairness of the process or penalty in discipline situations. Dismissal of a school bus driver who had used physical force on four students was held to be "so disproportionate to the offense as to be shocking to one's sense of fairness." The driver had been a bus driver for fifteen years, most of his recent evaluations revealed good judgment in his work, and the students on his bus were considered difficult to handle.[108] In Pennsylvania, demotions of school principals based on an arbitrary or discriminatory standard rather than a just cause standard were upheld. Thus, the district's principal transfer protocol was permissible as a reasonable method of matching various principals throughout the city school system with schools in which they could best be able to use their individual talents.[109] A probationary employee in New York who had received unsatisfactory reports concerning watching television when he was supposed to be on duty could be discharged for any reason that was not arbitrary, capricious, or in bad faith.[110] Conviction of a school superintendent under Georgia's RICO Act was reversed where the superintendent's signing of the disclosure letter attesting to the accuracy of financial records did not make the superintendent an aider or abetter to diversion of funds by two assistant superintendents.[111]

Employee discipline also involves the question of liability for board members who are part of the decision process. In a decision of some importance in Minnesota, the state appeals court decided that a school board that follows the statutory termination process is not necessarily entitled to judicial immunity. The board is entitled to quasi-judicial immunity as to the adjudicatory function but not as to actions that lead up to and include the bringing of charges. The final decision to terminate or retain the employee is entitled to absolute privilege as long as the requirements of the law have been followed.[112]

Discipline situations can also have implications for unemployment compensation. In an interesting case reflecting the interplay between unemployment compensation and breach of contract, the Nebraska Supreme Court has decided that a school cook determined to have engaged in misconduct so as to render her ineligible for unemployment compensation benefits was nonetheless able to recover for breach of contract involving the discharge.[113] In awarding the plaintiff $4,558 for breach of contract, the court decided that her discharge following her reference to the principal as a "dumb bastard" after a conference involving her son was not justified under contract which provided employment as long as she provided satisfactory service. A former probationary teacher was not eligible for unemployment compensation benefits where she had passed only two of the three parts of the NTE exam.[114]

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[108] Ross v. Oxford Academy and Cent. Sch. Dist., 590 N.Y.S.2d 552 (N.Y. App. Div. 1992).

[109] Harris v. School Dist. of Philadelphia, 624 A.2d 784 (Pa. Commw. Ct. 1993).

[110] Guilbe v. New York City Bd. of Educ., 597 N.Y.S.2d 164, 165 (N.Y. App. Div. 1993).

[111] Purvis v. State, 433 S.E.2d 58 (Ga. Ct. App. 1993).

[112] Villarreal v. Independent Sch. Dist. No. 659, Northfield, Minn., 505 N.W.2d 72 (Minn. Ct. App. 1993).

[113] Ballard v. Giltner Pub. Sch., Sch. Dist. No. 2, Hamilton County, 492 N.W.2d 855 (Neb. 1992).

Insubordination

In all reported cases where employees were discharged for insubordination, the discharge was upheld. In a Colorado case, a teacher was properly dismissed for insubordination and neglect of duty where he continued to make comments with sexual innuendo to sixth grade students despite a prior warning that future conduct of that nature would warrant dismissal.[115] A teacher who failed to develop and implement a professional growth plan after having been placed on conditional status for failing to discontinue a doll making project could be discharged for insubordination.[116] A school custodian, terminated for failing to follow work assignments, for failing to report to the superintendent's office when ordered to do so, and for smoking in the high school building after the superintendent had directed her not to do so, was guilty of insubordination and her misconduct was sufficient under state statute to make her ineligible for unemployment compensation benefits.[117]

Unprofessional Conduct, Unfitness, Willful Neglect of Duty

These categories of employee termination are quite general and thus it is not surprising that courts disagree whether individual fact situations will support dismissal on these grounds. A junior high school teacher who had shown a portion of an "R" rated movie to her reading class without previewing the film as required by the school board could be dismissed for willful neglect of duty.[118] Dismissal of a tenured math teacher was not "shocking to one's sense of fairness" where he had been found guilty of fourteen specifications of misconduct, including a charge that he solicited a student to vandalize the automobile of an assistant principal at one of the schools.[119] Dismissal of a tenured teacher was not an excessive penalty where he had failed to improve his performance despite many warnings and opportunities to do so and where he indicated that he would not improve his skills if permitted to return to work.[120]

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[114] Claim of Ambrose, 595 N.Y.S.2d 126 (N.Y. App. Div. 1993).

[115] Knowles v. Board of Educ., Sch. Dist. No. RE-1, Valley, Logan County, 857 P.2d 553 (Colo. Ct. App. 1993).

[116] Hope v. Charlotte-Mecklenburg Bd. of Educ., 430 S.E.2d 472 (N.C. Ct. App. 1993).

[117] Helmick v. Kansas Employment Sec. Bd. of Rev., 839 P.2d 49 (Kan. Ct. App. 1992).

[118] Roberts v. Rapides Parish Sch. Bd., 617 So. 2d 187 (La. Ct. App. 1993).

[119] Scheiber v. New York City Bd. of Educ., 593 N.Y.S.2d 563, 564 (N.Y. App. Div. 1993).

Attempts to dismiss teachers under these grounds have been unsuccessful where equity and credibility became issues. In Oregon, the Fair Dismissal Appeals Board, in reversing a teacher termination, had properly taken into consideration subjective factors in interpreting "neglect of duty." In this case, a teacher was dismissed after a police search revealed that her husband had been using their jointly owned home to grow and sell marijuana. The Appeals Board determined that in light of the teacher's personal and family circumstances which she maintained were inconsistent with her ability to take measures to prevent her husband's misuse of the house, the school board had failed to prove neglect of duty.[121] A teacher dismissed for allegedly having sexual intercourse with a seventh grade student resulting in her pregnancy was ordered reinstated and granted backpay of $77,000 when the administrative officer's decision in favor of the teacher's credibility was supported by the evidence. A polygraph test taken by the girl identified the teacher as the baby's father and the paternity test did not exclude the teacher, but the girl's varying testimony regarding the date and time of day the sex took place made the teacher's verified testimony regarding his activities more credible.[122]

Immorality

Only two cases were reported in this section. A tenured high school teacher who edited a high school newspaper could be dismissed for immorality for publishing and distributing to his media class a publication that contained articles and advertisements with explicit, crude, and tasteless references that promoted or at least condoned the use of drugs and that accused the local police of substance abuse.[123] Conviction of a vocational technical director for a summary offense of harassment was not immoral conduct within the meaning of the Public School Code provision governing termination of a professional employee's contract, even though conviction and behavior underlying it were unbecoming to a professional.[124] In Pennsylvania, the court observed that "not all unprofessional conduct automatically rises to the level of immorality."[125]

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[120] Jones v. New York City Bd. of Educ., 592 N.Y.S.2d 441 (N.Y. App. Div. 1993).

[121] Kari v. Jefferson County Sch. Dist. No. 509-J, 852 P.2d 235 (Or. Ct. App. 1993).

[122] East St. Louis Sch. Dist. No. 189 v. Hayes, 604 N.E.2d 557 (Ill. Ct. App. 1992).

[123] Gerig v. Board of Educ. of Cent. Sch. Dist. R-III, 841 S.W.2d 731 (Mo. Ct. App. 1992).

[124] Horton v. Jefferson County-Dubois Area Vocational Technical Sch., 630 A.2d 481 (Pa. Commw. Ct. 1993).

[125] *Id.* at 484.

Incompetency

With the exception of one case, school districts were successful in nonrenewing and terminating employees on the grounds of incompetence. A tenured teacher's contract nonrenewal for willful neglect of duty and incompetency was upheld as supported by the results of her principal's seven class observations, a plan of improvement, a revised plan of improvement, and a letter of admonishment concerning poor student discipline and lack of classroom control.[126] Evidence that middle school teachers had been excessively late to school, had received "needs improvement" for two successive years, and had failed to comply with the Individualized Professional Assistance Plan was sufficient evidence to sustain dismissal for incompetency.[127] Dismissal of a school district manager for incompetence and acting in an improper manner was supported by such evidence as unauthorized payments, unauthorized and improper use of credit cards, unauthorized receipt of vacation days, and unauthorized and improper payments for tax liability.[128] Dismissal of a school bus driver for striking two pupils was justified on the ground of incompetence.[129] The penalty of termination for a clerical employee who had worked for the school district in excess of twenty years was not excessive where the employee had engaged in such practices as refusal to perform assigned tasks, unauthorized processing of purchase orders, and failing to follow district policies for acts such as door slamming, screaming, and writing hostile letters to her supervisor.[130] A principal demoted to an elementary teaching position on the basis of incompetency was not entitled to reinstatement to principal, even though the school board had failed to comply with a state statute requiring an evaluation sixty days prior to giving notice of transfer. At most, the principal was entitled only to compensation of any diminution in salary suffered as a result of the transfer.[131]

In only one case was a teacher dismissal on the grounds of incompetence reversed. In dismissing a teacher who had shown two R-rated films in class and who otherwise had an unblemished record, the school board had abused its discretion.[132] Although the teacher should have been disciplined for subjecting his students to the nudity, vulgarity, violence, and explicit scenes, dismissal was too harsh a remedy.

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[126] Independent Sch. Dist. No. 4 of Harper County v. Orange, 841 P.2d 1177 (Okla. Ct. App. 1992).

[127] Board of School Comm'rs of Baltimore City v. James, 625 A.2d 361 (Md. Ct. App. 1993).

[128] Monaghan III v. Board of Sch. Directors of Reading Sch. Dist., 618 A.2d 1239 (Pa. Commw. Ct. 1992).

[129] Heslop v. Board of Educ., Newfield Cent. Sch. Dist., 594 N.Y.S.2d 871 (N.Y. Sup. Ct. 1993).

[130] *In re* Fleming, 593 N.Y.S.2d 108 (N.Y. App. Div. 1993).

[131] Jefferson v. Compton Unified Sch. Dist., 17 Cal. Rptr. 2d 474 (Cal. Ct. App. 1993).

[132] West v. Tangipahoa Parish Sch. Bd., 615 So. 2d 979 (La. Ct. App. 1993).

Compliance with School Board Policies and State Statutes

An important requirement in disciplining employees is to follow statutory requirements. A teacher who was nonrenewed by a school board on recommendation of the principal was entitled, under Kentucky's Effective Instructional Leadership Act, to challenge the principal's reason before the Evaluation Appeals Panel. The Panel was required to conduct a trial-like hearing to review the judgmental conclusions contained in his individual teacher evaluation that was the basis of his nonrenewal.[133] Under Idaho's nonrenewal statute, a teacher whose contract had not been renewed because she had performed work in an unsatisfactory manner was required to be placed on probation before her contract could be nonrenewed.[134] A nontenured teacher dismissed at the end of her second year because she received an unsatisfactory rating by her principal, was properly dismissed under state statute even though the rating sheets and the principal's testimony had been introduced at the board hearing rather than the anecdotal records from the teacher's personnel file.[135] Under Illinois statute, a school board's reason for demotion of a principal that she had not made sufficient progress in meeting and correcting administrative performance concerns, was adequate. Although statements of fact underlying the reason for reclassification would have been helpful, they were not required by the statute.[136]

Employees prevailed on a number of theories relying generally on the reasonableness of the employer's actions. A discharged probationary teacher had a cause of action alleging that her discharge was in retaliation for having reported various incidents of suspected child abuse.[137] An elementary teacher who had been adjudicated guilty of attempted commission of a lewd or lascivious act with a minor was entitled to a hearing after the school board had dismissed the teacher based only on the judgment of conviction.[138] "The law is well established that a judgment of conviction of a criminal offense, whether based on a plea of guilty or non contendere, is not admissible in a subsequent civil proceeding as proof of the fact on which it is based."[139] A nontenured teacher's dismissal by the school board was determined to have a rational basis where the teacher's lack of classroom control and his difficulty in utilizing classroom management techniques were frequently cited, even though the teacher's evaluations contained many positive comments.[140] A certified teacher's loss of pay as a result of her one-day suspension could adequately be redressed through a state law breach of contract action and therefore did not support the teacher's section 1983 action for violation of due process rights.[141] A nontenured teacher/coach dismissed by a school board after the coach had used a racial slur toward her black players was ordered reinstated. The school board had violated its own separation policy which allowed for dismissal only when recommended by both the principal and superintendent. In this case, both had recommended only short term suspensions without pay.[142] Subdistrict superintendents in Chicago had contractual rights as a result of the State School Reform Act and the school board's reduction in the number of subdistricts resulting in termination or reassignment of the superintendents violated their contractual rights.[143] A middle school principal who had been told by the personnel department to sign a senior high assistant principal contract form, and who subsequently had his contract as assistant principal nonrenewed, nonetheless had his position as principal renewed by virtue of the board's failure to nonrenew that position.[144]

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[133] Thompson v. Board of Educ. of Henderson County, 838 S.W.2d 390 (Ky. 1992).

[134] Gunter v. Board of Trustees, Pocatello Sch. Dist. No. 25, 854 P.2d 253 (Idaho 1993).

[135] Phillis v. Board of Sch. Directors of Mechanicsburg Area Sch. Dist., 617 A.2d 830 (Pa. Commw. Ct. 1992).

[136] Ehorn v. Board of Educ. of Robinson Community Unit Sch. Dist. No. 2, 618 N.E.2d 1149 (Ill. App. Ct. 1993).

[137] Hanley v. New York State Executive Dep't, Div. for Youth, 589 N.Y.S.2d 366 (N.Y. App. Div. 1992).

[138] Williams v. Castor, 613 So. 2d 97 (Fla. Dist. [illegible]t. App. 1993).

[139] *Id.* at 99.

Dismissal of employees were upheld under various state statutes for a number of reasons. A Kentucky assistant principal reassigned as a classroom teacher was not entitled to a hearing under the Kentucky Teacher Tenure Act because he had not served three years as a probationary principal.[145] A decision by the Texas Commissioner of Education to order reinstatement of a nonrenewed teacher was reversed as exceeding the requirements of the Term Contract Nonrenewal Act. The Act required only that periodic written evaluations for each teacher must be considered before deciding not to renew term contracts, whereas the Commissioner had required that the teacher's "current year" evaluation be considered before a teacher's contract could be nonrenewed.[146] A school board rule that a nontenured teacher's contract that had expired needed three of five votes to renew was not satisfied when only two votes to renew were cast; an abstention did not count as an affirmative vote.[147] A teacher dismissed for good cause for verbally abusing and sexually harassing students lost his claim in federal court because his failure to properly appeal a decision of the Texas Education Agency rendered the decision of that agency res judicata as to the federal court claim.[148] A special education teacher who had been advised that she might not be rehired for the spring term, but who was then called by an assistant principal to report to a particular program, was ineligible for unemployment compensation benefits on the basis of a voluntary quit when she refused to report for work unless she had her own scheduled classes.[149]

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[140] McKenzie v. Webster Parish Sch. Bd., 609 So. 2d 1028 (La. Ct. App. 1992).
[141] Presley v. Board of Educ. of Martin County, 859 S.W.2d 133 (Ky. Ct. App. 1993).
[142] Easterling v. Monroe City Sch. Bd., 612 So. 2d 975 (La. Ct. App. 1993).
[143] Kaszubowski v. Board of Educ. of Chicago, 618 N.E.2d 609 (Ill. App. Ct. 1993).
[144] State *ex rel.* Smith v. Etheridge, 605 N.E.2d 59 (Ohio 1992).
[145] Board of Educ. of Kenton County, Ky. v. Paul, 846 S.W.2d 675 (Ky. 1993).
[146] Amarillo Indep. Sch. Dist. v. Meno, 854 S.W.2d 950 (Tex. Ct. App. 1993).
[147] Forbis v. Fremont County Sch. Dist. No. 38, 842 P.2d 1063 (Wyo. 1992).

In two unusual cases, teachers who had been dismissed were nonetheless entitled to some financial benefit. A probationary teacher who had engaged in outrageous classroom behavior by cutting a student's hair and using a racial epithet less than a month prior to the end of the three-year probationary period did not receive a sixty-day notice of dismissal prior to her termination. Although the teacher could be dismissed, she was entitled to fifty-two days back pay, the difference between the date the notice had been actually given and the sixty-day statutory requirement.[150] A Connecticut elementary school teacher who was terminated from his employment as a result of allegations of inappropriate touching of a girl was nonetheless entitled to temporary total disability and temporary partial disability payments because the commission had determined that the teacher "had established a mental injury as a result of unsubstantiated charges having been brought against him by his former student."[151]

Reduction-in-force and Involuntary Leaves of Absence

Reorganization or consolidation of school districts or property within districts, declining student enrollments, or fiscal restraints may necessitate a reduction-in-force (RIF). The sufficiency of reasons for RIF, the actual selection of employees to be laid off, the realignment or reassignment of employees, and call-back rights are governed by state tenure statutes, local board policies, and collective bargaining agreements.

Necessity for Reduction-in-force

An Oklahoma school board's anticipation of a budget short-fall resulting in the lay off of a probationary nontenured teacher is a nonreviewable decision by a court where the teacher attempts to challenge the necessity for the RIF.[152] Under an Illinois statute, a physical education teacher was RIFfed because the number of physical education teachers needed decreased even though the total number of teachers throughout the district increased.[153] In Illinois, "a school board may legitimately reduce the number of teachers in one area, based upon reduced need, even when it is necessary to increase the number of teachers in other areas."[154] An Ohio school board's RIF of a full-time teacher and then rehiring her for two subsequent years through part-time contracts was upheld even though the RIF and the recall occurred at the same board meeting.[155]

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[148] Jarmon v. Houston Indep. Sch. Dist., 805 F. Supp. 24 (S.D. Tex. 1992).

[149] *In re* De Guzman, 589 N.Y.S.2d 637 (N.Y. App. Div. 1992).

[150] Tucker v. Board of Educ., Community Sch. Dist. No. 10, 592 N.Y.S.2d 723 (N.Y. Sup. Ct. 1993).

[151] Crochiere v. Board of Educ. of Enfield, 630 A.2d 1027, 1032 (Conn. 1993).

Elimination of Position

A Connecticut statute governing termination of tenured teachers as part of a RIF requires that termination occur according to collective bargaining agreement or, in the absence of such agreement, written policy of the board of education. In the absence of such agreement or policy, the school board violated the statute in terminating a vice-principal as part of a plan to reduce the number of vice-principal positions.[156] Demotion of a vice-principal to a teacher, following elimination of his position, was not arbitrary, discriminatory, or founded upon improper considerations where the school district had experienced declining enrollment, seven other professional employees had been furloughed at the same time the plaintiff had been demoted, and the demotion resulted in cost savings to the district.[157]

Selection of Employees

For purposes of selecting the employee to be RIFfed, the date an employee began performing duties at his director level was the critical factor, not the later date when the position became reclassified as a certificated position.[158] A teacher's demotion from full-time to three-fourths because of declining enrollments was according to state law because it was neither arbitrary nor discriminatory nor founded upon improper considerations.[159] A terminated school guidance counselor whose position had been eliminated was entitled to bump a less senior special education counselor, where he had the standard school counselor certification required by the state, but lacked special education counselor certification required by a board of education job description. In this case, the school board was obligated to follow the bumping rights in the collective bargaining agreement which did not require dual certification.[160] In Virginia, a freeze policy which permitted probationary teachers to perform extra duties that could have been performed by continuing contract teachers was not void as contrary to Virginia law where Virginia statutes permit school boards to treat all teachers during RIF as if they had not reached continuing contract status.[161] The measure of damages for loss of insurance coverage for a teacher who had been improperly furloughed in Pennsylvania was the teacher's actual loss.[162]

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[152] Childers v. Independent Sch. Dist. No. 1 of Lincoln County, 842 P.2d 355 (Okla. Ct. App. 1992).

[153] Piquard v. Board of Educ. of Pekin Community High Sch. Dist. No. 303, 610 N.E.2d 757 (Ill. App. Ct. 1993).

[154] *Id.* at 762.

[155] State *ex rel.* Van Dorn v. Mt. Gilead Exempted Village Sch. Dist., 604 N.E.2d 239 (Ohio Ct. App. 1992).

[156] Theriault v. Board of Educ. of Bloomfield, 626 A.2d 781 (Conn. Ct. App. 1993).

[157] Kaczmarcik v. Carbondale Area Sch. Dist., 625 A.2d 126 (Pa. Commw. Ct. 1993).

[158] Volk v. Board of Educ. of City Sch. Dist. of Rochester, 600 N.Y.S.2d 877 (N.Y. App. Div. 1993).

Realignment/Reassignment

A written agreement between a tenured teacher and a school district to place the teacher in a .8 full-time position with .2 unrequested leave of absence did not constitute a waiver release under the Human Relations Act so as to require notice of right to rescind the agreement.[163] A teacher who held a nonadministrative position of system library media specialist and who was also certified as an administrator was not entitled under Connecticut's Teacher Tenure Act to bump an administrator of lessor seniority.[164] While the librarian could have bumped a teacher had a position been available, his bumping of an administrator would have interfered with the "the board's managerial discretion . . . ."[165]

A Pennsylvania statute requiring a school to realign its professional staff to retain qualified senior employees for positions held by less senior employees did not require the school district to reassign the senior teacher to a position entitled "elementary gifted specialist" held by a less senior teacher, where the more senior teacher did not possess the required program specialist certificate nor did he possess qualifications needed to obtain one.[166] Although a school board in Minnesota has the authority to select its superintendent, a school board cannot deprive a

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159. Piazza v. Millville Area Sch. Dist., 624 A.2d 788 (Pa. Commw. Ct. 1993).
160. McKee v. Board of Educ. of Watertown, 627 A.2d 951 (Conn. Ct. App. 1993).
161. Underwood v. Henry County Sch. Bd., 427 S.E.2d 330 (Va. 1993).
162. Arcurio v. Greater Johnstown Sch. Dist., 630 A.2d 529 (Pa. Commw. Ct. 1993).
163. McClaine v. Independent Sch. Dist. No. 16, Spring Lake Park, 503 N.W.2d 810 (Minn. Ct. App. 1993).
164. Trotta v. Board of Educ. of Plymouth, 628 A.2d 1343 (Conn. Ct. App. 1993).
165. *Id.* at 1345.
166. Dilley v. Slippery Rock Area Sch. Dist., 625 A.2d 153 (Pa. Commw. Ct. 1993).

more senior elementary principal of his statutory tenure bumping rights by seeking to abolish the elementary principal position and making it a half time position along with a one-half time superintendent.[167] A tenured teacher certificated to teach English in K-12, who was RIFfed from her high school English teaching job, should have been afforded a temporary vacancy for one year in a middle school. The teacher's lack of elementary certification was not a bar because the departmentalized middle school was classified as a secondary school for employee entitlement purposes.[168]

Call-back Rights

A teacher who had recovered past and future wages as a result of the district's having failed to properly follow its RIF policy was foreclosed from later asserting that he was entitled to receive preferential treatment under the RIF policy's rehire provision.[169]

Contract Disputes

Many types of problems can arise concerning the contract of employment: the validity of the contract; the inclusion of ancillary administrative, statutory, collective bargaining, and other provisions; and questions regarding breach of contract. Like other contracts, employment contracts require an offer, consideration, and acceptance. Contracts can frequently be fact specific depending on the terms of individual documents.

Board Policies and Contract Stipulations

Only two cases in this section did not deal with worker's compensation. In Ohio where a collective bargaining agreement supersedes statutory language, a contractual provision that a supplemental coaching assignment terminated at the completion of the assignment was clear and unambiguous and did not require any statutory notice.[170] Teachers who had not been paid for four days during the school year after the school board had closed the schools due to insufficiency of funds were not entitled to summary judgment of the contract claims. Because the contract was ambiguous, the use of parol evidence raised a question of fact to be addressed at trial.[171]

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[167] Klein v. Board of Educ. of Indep. Sch. Dist. No. 671, Hills-Beaver Creek, 497 N.W.2d 620 (Minn. Ct. App. 1993).

[168] Lammers v. Board of Educ. of Borough of Point Pleasant, 616 A.2d 1293 (N.J. Super Ct. App. Div. 1992).

[169] Hansen v. Sheridan County Sch. Dist. #2, 847 P.2d 1026 (Wyo. 1993).

[170] Holthaus v. Cincinnati Bd. of Educ., 602 N.E.2d 360 (Ohio Ct. App. 1991).

A high school art teacher was not entitled to worker's compensation as a result of mental disability he claimed was caused by a student that had become ruder, noisier, and more disrespectful after curricular changes.[172] "An idiosyncratic reaction to the ordinary stresses of employment does not create the injury necessary to sustain a claim of mental disability."[173] A school secretary was not entitled to worker's compensation for emotional injuries as a result of misperception that her principal was distancing himself from her.[174] In reversing a worker's compensation award, the Michigan Court of Appeals determined that a custodian's mental disability had not been caused by a heavy workload because all custodians had been assigned more work due to lay offs. The charge of harassment due to checking on his license plates to see if plaintiff was working another job was not supportable because plaintiff was not even aware at the time the checking occurred.[175] A finding that a public school employee's death from cardiorespiratory arrest was a physical injury caused by work-related mental stress was supported by testimony of a medical expert that mental stress caused minor strokes which eventually killed the employee; testimony of the employee's wife that the employee was upset and worried about a child abuse allegation; investigation into the employee's disciplinary policies; perceived lack of support from the school district's superintendent; and evidence that the employee did not suffer from stress at work prior to the time the allegation was made.[176] A teacher reinstated after a union grievance proceeding could not have her unemployment compensation claim defeated by the school district's refusal to assign work to her and then arguing that she had not performed services for the district.[177]

Administrative Regulations and Statutory Provisions

The most frequent kind of case in this section involved compensation issues under state laws. An Indiana statute requiring teachers employed by the state prison to receive "equal pay" compared to public school teachers employed by a relevant school corporation did not entitle the prison teachers to more pay simply because they had more contact hours with students during a standard work day than public school teachers.[178] In Ohio, state employees who are members of the Ohio national guard are entitled under state statute "to leave of absence . . . without loss of pay . . . not to exceed thirty-one days in any one calendar year." However, the Ohio Supreme Court has interpreted the statute to mean that a teacher who had gone on active duty for three years was entitled to compensated leave of absence only for the first of the three years.[179] In Louisiana, a school may not deduct from a teacher's salary any amount greater than the amount paid to a substitute teacher, even if the regular teacher had exhausted all authorized leave.[180] Under a state statute permitting a salary schedule to be designed by job description and job definition, a school district could have a separate salary schedule for counselors and social workers, paying social workers at a higher salary than counselors, and thus conform to the statutes.[181]

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[171] Eiche v. East Baton Rouge Parish Sch. Bd., 623 So. 2d 167 (La. Ct. App. 1993).

[172] Boyle v. Detroit Bd. of Educ., 494 N.W.2d 818 (Mich. Ct. App. 1992).

[173] *Id.* at 821.

[174] Bach v. Flint Bd. of Educ., 494 N.W.2d 815 (Mich. Ct. App. 1992).

[175] Gardner v. Van Buren Pub. Sch., 494 N.W.2d 845 (Mich. Ct. App. 1992).

[176] Ponca City Pub. Sch. v. Ritcheson, 853 P.2d 782 (Okla. Ct. App. 1993).

[177] Lehr v. Unemployment Compensation Bd. of Review, 625 A.2d 173 (Pa. Commw. Ct. 1993).

One West Virginia case dealt with selection of employees where seniority and qualifications may be in conflict. Decisions of West Virginia county boards of education affecting filling of vacant positions must be based primarily on applicant qualifications for the job, with seniority having a bearing on the selection process only when the applicants have otherwise equivalent qualifications or when differences in qualification criteria are insufficient to form the basis for an informed and rational decision. In this case, a county board did not illegally rely on a hired teacher's seniority in filling an English position where the teacher actually hired had over five years of teaching experience and the unsuccessful applicant had only 100 days of experience.[182]

Two cases dealt with employment rights or benefits. An elementary teacher's claim for accidental disability retirement benefits was denied where her job duties that involved frequent walking, standing, and bending over were common to necessary human activities and to many jobs.[183] A teacher who brought a civil rights action for unlawful discharge was prevented from doing so because of a prior oral compromise settlement prohibiting such a lawsuit. The settlement was not void under Wyoming's statute of frauds, while the terms of the agreement were based on a transcript of the settlement hearing.[184]

Several cases addressed rights to employee benefits in debtor or marital dispute claims. A debtor's annuity contract issued by a teachers' insurance association and qualified under ERISA was excluded from the debtor's estate for purposes of bankruptcy.[185] In a Missouri proceeding, the state court of appeals ruled that a wife's public school pension benefits were her separate property and not marital property.[186] A Kentucky statute exempting contributions to the teachers' retirement system from division as marital property was held to have a rational purpose of protecting teachers upon retirement, especially since teachers were excluded from participation in the Social Security system.[187] A public school teacher's retirement account in Missouri is separate rather than marital property and thus not subject to division by a trial court in a marriage dissolution.[188]

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[178] Indiana State Prison v. Simchak, 615 N.E.2d 112 (Ind. Ct. App. 1993).

[179] Snide v. Columbus Bd. of Educ., 614 N.E.2d 754, 755 (Ohio 1993).

[180] St. Bernard Ass'n of Educators v. St. Bernard Parish Sch. Bd., 619 So. 2d 678 (La. Ct. App. 1993).

[181] Osborn v. Harrison Sch. Dist. No.2, 844 P.2d 1283 (Colo. Ct. App. 1992).

[182] Butcher v. Gilmer County Bd. of Educ., 429 S.E.2d 903 (W. Va. 1993).

[183] Adams v. Contributory Retirement Appeal Bd., 609 N.E.2d 62 (Mass. 1993).

[184] Brockman v. Sweetwater County Sch. Dist. No. 1, 826 F. Supp. 1328 (D. Wyo. 1993).

Two cases dealt with retirement system credits. A substitute teacher who had worked for more than 120 days in each of eight years was entitled under Oklahoma's Teacher Retirement System to retirement credit. The State Board of Trustees of the Teachers' Retirement System denied the credit was arbitrary and capricious because the Board had originally accepted the teacher's tender of full payment and later reversed itself.[189] A Pennsylvania court has determined that money paid to a school district employee to purchase retirement credit for military service was "severance payment" rather than "compensation," and therefore was not part of a final average salary for computing retirement benefits.[190] One case involved a matter of procedural significance. In Maryland, approval by a county superintendent of a challenged report of a teacher was a resolution of a "controversy or dispute" allowing appeal of the superintendent's decision to the State Board of Education.[191]

A former school board member's conviction was upheld as a result of his nine cash advances over the period of two days to buy musical equipment, even though the equipment was for the school district.[192] Such expenditures were not authorized by district policy and were therefore a use "other than the public use authorized by law" within the meaning of statute.[193]

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185. Kelvington v. Skiba, 146 B.R. 358 (W.D. Pa. 1992).
186. Kieninger v. Catlett, 854 S.W.2d 59 (Mo. Ct. App. 1993).
187. Waggoner v. Waggoner, 846 S.W.2d 704 (Ky. 1992).
188. Mallams v. Mallams, 861 S.W.2d 822 (Mo. Ct. App. 1993).
189. State *ex rel.* Bd. of Trustees of Teachers' Retirement Sys. v. Garrett, 848 P.2d 1182 (Okla. Ct. App. 1993).
190. Dowler v. Public Sch. Employees' Retirement Bd., 620 A.2d 639 (Pa. Commw. Ct. 1993).
191. Strother v. Board of Educ. of Howard County, 623 A.2d 717 (Md. Ct. App. 1993).
192. People v. Morse, 859 P.2d 247 (Colo. Ct. App. 1993).
193. *Id.* at 249.

Tenure

Tenure Status

Most of the cases in this section were resolved in favor of the school district. In Minnesota, an associate superintendent for curriculum and instruction is not a teacher under the State Teacher Tenure Act. Therefore, the associate superintendent whose position had been abolished in an administrative reorganization had no bumping rights.[194] A school district employee who had served only as a principal, after serving only six months as a teacher, was not a "permanent teacher" under Missouri's Teacher Tenure Act but rather was a principal whose status for purposes of termination of employment was governed by statute applicable to certificated teachers ineligible for permanent status under the Act.[195] Although a guidance counselor whose position had been terminated could extend her tenure to other endorsements subsumed under the same certificate, tenure could not be extended to a new position which required relevant work experience.[196] A teacher in Illinois lost in a mandamus action against her school district to award her tenure when she claimed that prior work as a vocational adjustment counselor should have counted toward tenure. The court observed that a teaching certificate was not required for that position and it, in fact, involved no actual teaching or supervision.[197] A tenured culinary arts teacher in a dissolved regional school district lost his statutory tenure rights when he was employed by a school committee. Thus, the teacher could be nonrenewed without following the tenure statute requirements.[198] In Alabama, a person serving as a school superintendent cannot acquire tenure because a superintendent is not a "supervisor" within the meaning of the state tenure law.[199]

School district employees presented litigable issues concerning tenure in two cases. The Supreme Court of Alabama has ruled that a genuine issue of material fact existed as to whether a teacher employed in an adult basic education program at Drake School was employed in a "public school" within the definition of the state tenure statute with the result that the teacher might have already acquired tenure.[200] A principal who was not granted tenure by a North Carolina school board had a cause of action challenging the board's action as capricious and arbitrary when the board failed to conduct the required number of evaluations during the second probationary year. However, since the principal had failed to appeal the trial court's directed verdict for the school board, the principal's claim was lost.[201]

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[194] Frye v. Independent Sch. Dist. No. 625, 494 N.W.2d 466 (Minn. 1992).

[195] Inman v. Reorganized Sch. Dist. No. II of Hayti, 845 S.W.2d 688 (Mo. Ct. App. 1993).

[196] Dennery v. Board of Educ. of the Passaic County Regional High Sch. Dist. No. 1, Passaic County, 622 A.2d 858 (N.J. 1993).

[197] Abernathy v. Board of Educ. of Community High Sch. Dist. No. 218, Cook County, 611 N.E.2d 1022 (Ill. App. Ct. 1992).

[198] McNiff v. South Middlesex Regional Vocational Technical Sch. Dist. Comm., 605 N.E.2d 849 (Mass. 1993).

[199] Dansby v. Dale County Bd. of Educ., 623 So. 2d 1122 (Ala. 1993).

[200] *Ex parte* Nelson, 607 So. 2d 1259 (Ala. 1992).

Tenure by Default or Acquiescence

New York statutes provide that a probationary period shall not exceed two years where the teacher was tenured in another school district within the state and was not dismissed. Accordingly, the teacher would then be automatically eligible for tenure after two years, even though the teacher's tenure in the present case had been in a different tenure area, in another school district, and she had left her tenured position more than twenty years earlier. By signing the teacher to a three year probationary contract, the school district was estopped from denying tenure to the teacher after she had started the third year.[202] A teacher who had served twenty-eight months prior to becoming injured and taking sick leave was improperly deprived of tenure rights, when after the expiration of three academic years within four consecutive academic years prior to the teacher's return to service, the board of education terminated her employment. The board had ample opportunity to evaluate the teacher during her twenty-eight months of active service prior to her injury and affording her tenure was consistent with protection for work-injured employees as contemplated by New Jersey statutes.[203]

Certification

Certification Standards

A former income tax auditor who had pleaded guilty to federal extortion and bribery charges and who was on probation at the time he applied for a temporary per diem teaching certificate could be denied a teaching certificate because he could not perform the duties of an elementary teacher "which requires the teacher to serve as a role model in the education of pupils in responsible law abiding citizenship."[204] A tenured teacher whose medical leave of absence had expired and whose teacher certificate had lapsed while he was on leave for sex-reassignment surgery was rightfully terminated where his lack of a certificate jeopardized his ability to execute his contract of employment.[205] Teachers who were denied renewable teaching certificates under invalidly promulgated regulations lost in their lawsuit to collect damages from the State Board of Education and its members.[206]

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[201] Clinton v. Wake County Bd. of Educ., 424 S.E.2d 691 (N.C. Ct. App. 1993).

[202] Gould v. Board of Educ. of the Sewanhaka Cent. High Sch. Dist., 599 N.Y.S.2d 787 (N.Y. Ct. App. 1993).

[203] Kletzkin v. Board of Educ. of Borough of Spotswood, Middlesex County, 619 A.2d 621 (N.J. Super. Ct. App. Div. 1993).

[204] Burstein v. Board of Examiners of N.Y. City Bd. of Educ., 589 N.Y.S.2d 554 (N.Y. App. Div. 1992).

Decertification, Revocation, or Suspension

A teacher whose license had been revoked for five years as a result of misappropriation of $5,515 of Drama Club funds had been treated appropriately under state statute even though the hearing was held before a panel of five rather seven persons.[207] Revocation of a substitute teacher's teaching licenses on the ground of immorality because of her sexual contact with boys twelve to fifteen years of age supported a basis for de novo trial after a trial court had reversed the revocation by granting summary judgment for the teacher.[208]

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[205] Snyder v. Jefferson County Sch. Dist. R-1, 842 P.2d 624 (Colo. 1992).

[206] State Bd. of Educ. v. Drury, 435 S.E.2d 436 (Ga. 1993).

[207] Miller v. Castor, 615 So. 2d 820 (Fla. Dist. Ct. App. 1993).

[208] Howard v. Missouri State Bd. of Educ., 847 S.W.2d 187 (Mo. Ct. App. 1993).

2

BARGAINING

Charles J. Russo

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Introduction

The number of reported opinions on collective bargaining and related labor issues increased slightly this year, ending a two year decline. Yet, once again there were no Supreme Court rulings on bargaining and the reported cases typically applied established precedents to different, if not new, factual settings. This chapter reviews disputes arising in the context of K-12; cases involving higher education are discussed in Chapter 7.

Constitutional Issues

As has been the case in recent years, the rulings in this section involved disagreements where fair share agreements were at the center of the controversy. The first two addressed issues related to freedom of speech and the methods used to collect the fees; the third concerned fees and freedom of religion.

Fair Share Agreements and Freedom of Speech

The only federal case in this section dealt with a challenge by nonmember teachers to the constitutionality of the methods employed by a union to collect agency shop fees.[1] In superseding an opinion it handed down three years earlier,[2] the Ninth Circuit sustained the constitutionality of the procedures. A divided court held that deducting full union fees from the paychecks of teachers who were not members and subsequently refunding amounts not actually spent on collective bargaining was not a violation of the First Amendment right to freedom of speech. The majority reasoned that since there were sufficient safeguards in place to ensure that the fees were used only for collective bargaining and the procedure for obtaining refunds of monies not used for bargaining was reasonably prompt, the First Amendment rights of nonunion members were protected.

An intermediate appellate court in New Jersey arrived at a different conclusion when it addressed a similar challenge by a teachers' union. The union sought to amend the regulation enacted by the State Public Employment Relations Commission governing the manner in which political activity deductions are processed. Under the proposed change unions would have been permitted to collect the entire fee and then wait for objections from nonmembers before making refunds. The court affirmed the regulation as a reasonable exercise of the Commission's authority.[3] It held that the union was required to deduct the political activity portion of its representation fee from all nonmembers, not just those who affirmatively objected. The court reasoned that otherwise the union would have had the temporary and perhaps permanent use of these funds for activities that might be objectionable to the nonmembers.

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[1] Grunwald v. San Bernardino City Unified Sch. Dist., 994 F.2d 1370 (9th Cir. 1993).

[2] Grunwald v. San Bernardino City Unified Sch. Dist., 917 F.2d 1223 (9th Cir. 1990). See THE YEARBOOK OF EDUCATION LAW 1991 at 38 for a full discussion of this case.

Fair Share Agreements and Freedom of Religion

The Supreme Court of Montana considered a nonassociation action brought by a teacher who objected, on religious grounds, to paying an agency fee. The teacher did not want to make the payments because she disagreed with the position of the local union's national affiliate in support of abortion and birth control. After a declaration that the nonassociation statute was unconstitutional, the court vacated and remanded.[4] In holding that constitutional grounds should be avoided whenever possible, it remanded for a determination of whether the union could, without incurring undue hardship on itself, reasonably accommodate the teacher's religious beliefs.

Recognition and Representational Issues

There are three cases in this section. The first two rulings concern unit determination while the third deals with the closely related question of union elections.

Unit Determination

Where a State Employment Relations Board (SERB) denied a school district's motion to dismiss a petition filed for the certification of an exclusive representative consisting of a combined bargaining unit to represent both certified and classified school employees, the district sought further review. Judgment was affirmed in favor of the SERB.[5] An appeals court in Oregon reasoned that the petition was proper since there was a dispute over representation arising from the creation of a new combined bargaining unit formed due to the merger of two formerly distinct units. Also, the court found no abuse of discretion by the SERB in conducting a bifurcated election with separate balloting by certified and classified employees before designating the newly combined unit. The SERB had adopted this measure because members of the latter, and smaller, group were concerned that the election not be decided by a simple majority vote.

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[3] New Jersey Educ. Ass'n v. New Jersey Pub. Employment Relations Comm'n, 628 A.2d 789 (N.J. Super. Ct. App. Div. 1993).

[4] Wolfe v. State of Montana Dep't of Labor and Indus., Bd. of Personnel Appeals, *ex rel.* Helena Educ. Ass'n, 843 P.2d 338 (Mont. 1992).

[5] Welches Sch. Dist. No. 13 v. Welches Educ. Ass'n, 842 P.2d 437 (Or. Ct. App. 1992).

A Michigan case put a twist on unit determination when it considered whether a consortium of school districts, rather than a representation petition advanced by teachers, is an appropriate means for deciding if bargaining can proceed. Here a teachers' union appealed a determination by the Employment Relations Commission that a consortium of three districts formed to provide adult education was the bargaining unit. An appeals court affirmed in favor of the Commission.[6] It reasoned that where state law neither explicitly authorizes nor forbids a consortium or joint venture formed by districts from acting as the separate employer of teachers, the Commission had the authority to decide whether the consortium, not its member districts, was the employer for the purposes of collective bargaining.

Elections

The first of the two cases in this subsection involved a dispute that arose when the union representing a school district's paraprofessionals filed a petition to accrete instructional assistants who would fill positions in an experimental program. The district opposed such an action, contending that since the new assistants would perform instructional tasks requiring more independence and discretion than the paraprofessionals, the teachers would object. Accordingly, the district filed suit after the Bureau of Mediation Services assigned the assistants to the existing unit of paraprofessionals without affording them the opportunity to conduct an election. An appeals court in Minnesota affirmed in favor of the Bureau. It reasoned that where a proposal is made to add employees to an existing bargaining unit, they are not entitled to an election pursuant to the provisions of the State Labor Relations Act.

Rights and Obligations of Exclusive Bargaining Representatives

There are seven cases in this section. The first two, each with a different result, were litigated over a school district's obligation to bargain in good faith with the exclusive representatives of teachers. The five remaining cases involved claims of a breach of duty of fair representation brought by teachers.

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[6] Holland-West Ottawa-Saugatuck Consortium v. Holland Educ. Ass'n, 501 N.W.2d 261 (Mich. Ct. App. 1993).

[7] School Serv. Employees Local No. 284, Eden Prairie, Minn. v. Independent Sch. Dist. No. 270, Hopkins, Minn., 499 N.W.2d 828 (Minn. Ct. App. 1993).

Rights of Exclusive Bargaining Representatives

A school board rescinded a salary offer made in the course of attempting to reach a new collective bargaining agreement and asked the teachers' association to renegotiate for another proposal. Yet, the board simultaneously sent the teachers new contracts reflecting salaries lower than in the original agreement. When the State Public Employment Relations Board (PERB) dismissed the association's unfair labor practices charge and ordered the parties to renegotiate, the association sought further review. The Supreme Court of New Hampshire reversed in favor of the association.[8] It concluded that the board breached its duty to negotiate in good faith with the teachers' association. The court reasoned that even though the board notified the association of its intent to renegotiate the terms of the original bargaining agreement, it did not do so before sending the teachers new contracts which not only offered lower wages but also indicated that they could not refuse to sign without risking the loss of their jobs.

A court in Florida examined a similar issue but reached a different conclusion. In this case a county school board sought further review of a determination by the Public Employees Relations Commission that it had committed an unfair labor practice by unilaterally discontinuing the payment of step increases to instructional and classified employees during the pendency of negotiations with their certified bargaining agent. An appeals court reversed in favor of the school board.[9] It reasoned that the board had not committed an unfair labor practice because a public employee's constitutional right to bargain collectively through an exclusive representative is not and cannot be coextensive with the right of an employee in the private sector. In other words, the court noted that since limitations such as funding may restrict the amount of money a public employer may have available to pay its employees, the board had the right to underfund the agreement.

Obligations of Exclusive Representatives

Teachers' unions prevailed in all five of the law suits filed by disgruntled members who alleged that the unions breached their duty of fair representation. The first two cases took place in New York. In the first

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8. Appeal of Franklin Educ. Ass'n, 616 A.2d 919 (N.H. 1992).
9. Sarasota County Sch. Dist. v. Sarasota Classified/Teachers Ass'n, 614 So. 2d 1143 (Fla. Dist. Ct. App. 1993).

action a maintenance worker, who was ordered reinstated but denied back pay for the time during which his employment had been terminated, brought suit against his union for a breach of its duty of fair representation. Judgment was reversed in favor of the union after its motion for summary judgment had been denied.[10] An appeals court found that the union representative appeared at all six days of the hearing, fully developed the mechanic's testimony, called supporting witnesses, and presented at least half of the many documents tendered by the employee. Consequently, it held that the mechanic failed to state a claim for breach on the part of the union since it had not engaged in arbitrary, discriminatory, or bad faith behavior.

The second New York case was brought by a teacher who alleged that her union breached its duty of fair representation when it chose not to proceed with the arbitration of her grievance after the school district notified her of a forthcoming transfer. An appeals court affirmed a grant of summary judgment in favor of the union.[11] It reasoned that where the union, after carefully considering the underlying facts, decided not to arbitrate based upon its conclusion that the claim lacked merit, it had not breached its duty.

A part-time teacher in Washington sued her union for a breach of its duty of fair representation when it refused to act on her behalf in a grievance over the recalculation of her service time. An appellate tribunal affirmed a dismissal in favor of the union.[12] It reasoned that the union had rational bases for denying the teacher's request to go to arbitration since her claims were neither based on the language of the operative bargaining agreement nor filed in a timely manner. Therefore the union was found not to have breached its duty because it made a good faith determination that the teacher's grievance was without merit.

A school counselor in Michigan requested further review of a determination by the Employment Relations Commission that his union had not breached its duty of fair representation when it missed the filing deadline for arbitration stemming from a dispute over whether he could use banked sick days. An appeals court affirmed in favor of the union.[13] It concluded that since the union acted in good faith to take the steps necessary to preserve the grievances, sought to extend the time limits for arbitration, aggressively pursued resolution of the underlying dispute by filing a class grievance on behalf of the counselor and others, and had a related arbitration case on the merits decided against it, the union had not breached its duty.

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[10] Altimari v. Parker, 592 N.Y.S.2d 509 (N.Y. App. Div. 1993).

[11] Kleinmann v. Bach, 600 N.Y.S.2d 327 (N.Y. App. Div. 1993).

[12] Schmidtke v. Tacoma Sch. Dist. No. 10, Pierce County, 848 P.2d 203 (Wash. Ct. App. 1993).

[13] Knoke v. East Jackson Pub. Sch. Dist., 506 N.W.2d 878 (Mich. Ct. App. 1993).

Finally, the only federal case in this subsection also originated in Michigan. Here a teacher sought further review of the dismissal of his suit charging the union with a breach of its duty of fair representation when, after a lay-off, he was not recalled to work prior to other less senior teachers. The Sixth Circuit affirmed the dismissal of his breach of duty claim.[14] It reasoned that where the teacher brought such a charge his action was properly dismissed due to his failure to exhaust internal union remedies. However, the court reversed a related claim in favor of the teacher, ruling that he was not required to exhaust the same union remedies before proceeding with his employment discrimination claim.

Scope of Bargaining

There are ten cases in this section. The first seven deal with mandatory subjects of bargaining, the next two address permissive topics, and the final ruling examines managerial prerogatives as a bar to collective bargaining.

Mandatory Topics of Bargaining

Two North Dakota decisions examined mandatory subjects of bargaining. In the first case the authorized representative of teachers in a school district appealed the dismissal of its petition for a writ of mandamus to compel further negotiations on the master contract. The association alleged that the district failed to bargain in good faith when negotiations broke off due to the parties' inability to reach an agreement on leave for illness, personal reasons, and professional purposes. The Supreme Court of North Dakota affirmed the dismissal.[15] It acknowledged that since different forms of leave are within the ambit of salary and hours as terms and conditions of employment, they are mandatorily negotiable. However, the court concluded that where the parties met pursuant to written ground rules they had each previously accepted, the district was not required to agree to a proposal or to make a concession. Thus, absent evidence of the board's refusal to bargain in good faith over mandatory topics, the association's charge was without merit.

Where a school district and the educational association representing teachers were unable to reach an agreement on base salaries and health insurance benefits, the district unilaterally issued contracts to the teachers. Subsequently, the association sought further review when its petition for a writ of mandamus requiring the school board to execute a negotiated agreement was denied. The Supreme Court of North Dakota reversed in favor of the association.[16] It held that although parties are free to determine whether certain subjects are bargainable, the courts can mandate negotiations on salaries, hours, the formulation of an agreement, binding arbitration, and the interpretation of any existing agreement.

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[14] Rogers v. Board of Educ. of the Buena Vista Sch., 2 F.3d 163 (6th Cir. 1993).

[15] Belfield Educ. Ass'n v. Belfield Pub. Sch. Dist. No. 13, 496 N.W.2d 12 (N.D. 1993).

A local school board and the State Board of Labor Relations appealed the dismissal of a prohibited practice charge complaint filed by a teachers' union after the board unilaterally imposed a smoke-free policy in the work place. Under the policy, smoking generally would have been prohibited while school was in session or when student activities were being conducted. The Supreme Court of Connecticut remanded in favor of the union.[17] It held that the board was required to negotiate over the secondary impact of the managerial decision to institute a smoke-free policy in the workplace if the implementation of such a policy would substantially affect working conditions.

Similarly, the New York PERB sought further review of a ruling which annulled its determination that a school district committed an unfair labor practice by not negotiating with school bus drivers over a smoking ban as it applied when students were not on the buses. An appeals court reversed in favor of the PERB.[18] It reasoned that since there was no objectively demonstrable public policy preempting the district's duty to negotiate the smoking ban as it was applied when students were not on the buses, it was subject to bargaining as it affects the terms and conditions of the drivers' employment.

In the first of two Illinois cases, a school district sought further review of a decision by the Educational Labor Relations Board (ELRB) finding that it had committed an unfair labor practice by refusing to bargain in good faith and for unilaterally reducing employees hours, eliminating health care benefits, and reclassifying personnel. An appeals court remanded in favor of the union.[19] It ruled that further proceedings, subject to a judicially created tripartite balancing test, were necessary for a determination of whether these items were mandatory subjects of bargaining.

The second ruling involved a school board's appeal of a decision by the ELRB that it had violated the Educational Labor Relations Act by conferring with individual employees to make changes in their benefits packages and by going outside of the bargaining unit to fill the position

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16. Dickinson Educ. Ass'n v. Dickinson Pub. Sch. Dist., 499 N.W.2d 120 (N.D. 1993).
17. Local 1186 of Council No. 4, AFSCME, AFL-CIO v. State Bd. of Labor Relations, 620 A.2d 766 (Conn. 1993).
18. Newark Valley Cent. Sch. Dist. v. Public Employment Relations Bd., 596 N.Y.S.2d 216 (N.Y. App. Div. 1993).
19. Georgetown-Ridge Farm Community Unit Sch. Dist. No. 4 v. Illinois Educ. Labor Relations Bd., 606 N.E.2d 667 (Ill. App. Ct. 1992).

of pompom sponsor. Judgment was affirmed in favor of the ELRB.[20] An appeals court in Illinois reasoned that since these changes in benefits affected the terms and conditions of employment and since district personnel had a reasonable expectation of filling the position as sponsor of the pompom squad, they were mandatory subjects of bargaining.

The final case in this subsection involved a suit by a union which alleged that a school board committed an unfair labor practice by unilaterally imposing a new instrument for use in teacher evaluations. An appeals court in Kansas affirmed in favor of the union.[21] It reasoned that the new appraisal procedures, changing the frequency and manner in which teachers' performances were evaluated were mandatorily negotiable since they affected a term and condition of employment under state law.

Permissive Topics of Bargaining

The first case in this subsection involved a second appeal by a school district after the Pennsylvania Labor Relations Board (PLRB) and a trial court concluded that it had committed an unfair labor practice by transferring the duties of the teacher who also served as athletic director to the status of a nonbargaining unit employee.[22] On further review, an appellate tribunal reversed in favor of the district.[23] It reasoned that in so far as the teacher was not acting within his capacity as a professional employee when engaged in the extracurricular activities as athletic director, his duties were not covered by the collective bargaining agreement relating to professional employees of the district. Thus, since the district's action did not constitute a transfer of work out of the bargaining unit, it had no duty to bargain over the assignment of nonprofessional responsibilities.

In the consolidation of three largely unrelated controversies, an appellate tribunal in the District of Columbia reached a decision with implications for both permissive and prohibited topics of bargaining.[24] The first point arose from a dispute over the school board's claim that the union's request for arbitration on a variety of matters, including grievance procedures, safety and health concerns, work force changes, hours of work, and holidays, should be denied because they were not mandatory subjects of bargaining. The court vacated and remanded, holding that even if an issue were not deemed to be a mandatory subject of bargaining, an arbitrator's decision on point could be enforced as long as it did not violate any statute or regulation. Turning to the disagreement over the establishment of the basic work week for several groups of employees and the right to assign and transfer employees, the court affirmed the PERB's determination. It concluded that since union proposals on these topics would have restricted managerial prerogatives, they were prohibited subjects of bargaining.

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[20] Board of Educ. of Sesser-Valier Community Unit Sch. Dist. No. 196 v. Illinois Educ. Labor Relations Bd., 620 N.E.2d 418 (Ill. App. Ct. 1993).

[21] Board of Educ., Unified Sch. Dist. No. 314 v. Kansas Dep't of Human Resources, 856 P.2d 1343 (Kan. Ct. App. 1993).

[22] Harbor Creek Sch. Dist. v. Harbor Creek Educ. Ass'n, 606 A.2d 666 (Pa. Commw. Ct. 1992). *See* THE YEARBOOK OF EDUCATION LAW 1993 at 48 for a full discussion of this case.

[23] Harbor Creek Sch. Dist. v. Pennsylvania Labor Relations Bd., 631 A.2d 1069 (Pa. Commw. Ct. 1993).

[24] Drivers, Chauffeurs and Helpers Local Union No. 639 v. District of Columbia, 631 A.2d 1205 (D.C. 1993).

Prohibited Topics of Bargaining

The association representing classified personnel sought further review after an arbitration award in its favor, ordering a modification of the existing salary scale, was vacated. Judgment was affirmed in favor of the school board.[25] An appeals court in Maryland reasoned that since the board's unilateral modification of employees' salary step placement was an integral part of the reclassification process, absent proof of bad faith, the board's implementation of the plan was beyond the scope of lawful bargaining and arbitration.

Grievability and Arbitrability

Consistent with the trend of recent years, this is the lengthiest section of the Chapter. Once again, cases are discussed under "Presumption and Arbitrability" where the courts considered whether the underlying dispute was within the scope of the collective bargaining agreement or where it was necessary to interpret public policy as it related to arbitration. Decisions are presented under "Who Determines" rather than "Judicial Review" where, regardless of the underlying issue, the courts decided the jurisdictional question of the appropriate forum within which the disagreement should be resolved. Opinions reviewed under "Procedural Issues" speak for themselves.

Presumption and Arbitrability

The first eleven of the fifteen cases in this subsection not only support the general rule that arbitration is the preferred means of resolving disputes over the interpretation of collective bargaining agreements, but also uphold arbitrators' decisions. The next two cases struck down arbitration awards for exceeding the scope of the bargaining agreement. Only in the final two cases did courts vary from the presumption in favor of arbitration.

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[25] Washington County Educ. Classified Employees Ass'n v. Board of Educ. of Wash. County, 629 A.2d 1330 (Md. Ct. Spec. App. 1993).

A former teacher in Maine brought a section 1983 action against the superintendent of schools and her immediate supervisor, alleging that she was constructively discharged without due process. Rather than be fired she resigned from her position on the advice of her physician. The former educator also claimed that the administrators discouraged her from filing a grievance over disputes she had with the supervisor. After the administrators' motion for summary judgment was dismissed, they appealed. The Supreme Judicial Court of Maine vacated in favor of the administrators.[26] It found that since no one other than representatives of the teachers association discouraged the former teacher from filing a grievance, the administrators could not be held liable. Furthermore, the court evidenced an attitude supporting a presumption of arbitrability when it held that the grievance procedures available to the teacher pursuant to the collective bargaining agreement would have constituted adequate predeprivation process.

The first of three Pennsylvania cases upholding arbitration awards reviewed the extent of an arbitrator's authority where the operative bargaining agreement was silent on the issue of a school district's ability to transfer students to another district on a tuition basis. After the arbitration award was affirmed in part and vacated in part the education association sought further review. The Pennsylvania Supreme Court affirmed.[27] It affirmed the part of the award which recognized the arbitrator's authority to decide that the transfer of students affected the allocation of bargaining work because it was drawn from the essence of the bargaining agreement. However, it also vacated that aspect of the arbitration award which improperly exceeded the terms of the agreement by extending beyond the expiration date of the contract.

A teachers' union and the PLRB sought further review of the reversal of a determination that a school district committed an unfair labor practice for refusing to stop scheduling teachers for more than three course preparations without first consulting with the affected individuals. Judgment was reversed in favor of the union and PLRB.[28] An appeals court in Pennsylvania reasoned that since the PLRB's finding was based on substantial evidence, and was not unreasonable, arbitrary, capricious, or illegal, it should be reinstated.

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[26] Ryan v. City of Augusta, 622 A.2d 74 (Me. 1993).

[27] Midland Borough Sch. Dist. v. Midland Educ. Ass'n, 616 A.2d 633 (Pa. 1992).

[28] Crawford Cent. Sch. Dist. v. Pennsylvania Labor Relations Bd., 618 A.2d 1202 (Pa. Commw. Ct. 1992).

In an ongoing dispute between a school district and the union representing its bus drivers, aides, and mechanics,[29] the break down of negotiations led the district to decide to subcontract out for these services. After a hearing officer and the PLRB ordered the district to rescind the subcontract and to reinstate work previously performed by the members of the bargaining unit, the district sought further review. An appeals court in Pennsylvania affirmed in favor of the PLRB.[30] It reasoned that the PLRB's final order was proper since it was supported by substantial and reasonable evidence.

In the final Pennsylvania case a school district sought further review after the PLRB found that it committed an unfair labor practice for unilaterally granting a four year supplemental contract to the high school's head basketball coach. An appeals court affirmed in favor of the PLRB.[31] It reasoned that where substantial evidence supported the conclusion that both past practice and the bargaining agreement dictated the annual renewal of such a contract, there was no reason to disturb the PLRB's decision.

A teacher sought further review after an intermediate appeals court reversed a finding of the SERB that his school district committed an unfair labor practice since its decision not to renew his contract was motivated by its disapproval of his involvement in union activities. The Supreme Court of Ohio reversed in favor of the teacher, ordering him reinstated with back pay.[32] The court reasoned that in so far as there was substantial evidence supporting the SERB's conclusion, its finding should be confirmed.

Where a school district which contracted out its food services operation was ordered to submit to binding arbitration over the effects of its decision,[33] it sought further review. The Supreme Court of Minnesota affirmed in favor of arbitration,[34] relying on its own precedent supporting a presumption in favor of arbitrability. It held that even though the operative collective bargaining agreement recognized contracting out as an inherently managerial right, the district was required to arbitrate over the impact of its action. The court concluded that arbitration was especially appropriate because the district's actions effectively eliminated the entire bargaining unit while the contract remained in effect.

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[29] For a related dispute between the same parties, *see* Elizabeth Forward Sch. Dist. v. Pennsylvania Labor Relations Bd. and AFSCME, 613 A.2d 68 (Pa. Commw. Ct. 1993). *See* THE YEARBOOK OF EDUCATION LAW 1993 at 51 for a full discussion of this case.

[30] Elizabeth Forward Sch. Dist. v. Pennsylvania Labor Relations Bd. and AFSCME, 624 A.2d 215 (Pa. Commw. Ct. 1992).

[31] Millcreek Township Sch. Dist. v. Pennsylvania Labor Relations Bd., 631 A.2d 734 (Pa. Commw. Ct. 1993).

[32] State Employment Relations Bd. v. Adena Local Sch. Dist. Bd. of Educ., 613 N.E.2d 605 (Ohio 1993).

[33] Independent Sch. Dist. No. 88, New Ulm, Minn. v. School Serv. Employees Union Local 284, 490 N.W.2d 431 (Minn. Ct. App. 1992). *See* THE YEARBOOK OF EDUCATION LAW 1993 at 48 for a full discussion of this case.

[34] Independent Sch. Dist. No. 88, New Ulm, Minn. v. School Serv. Employees Union Local 284, 503 N.W.2d 104 (Minn. 1993).

The first of two New York opinions involved an action by a school district which sought further review of the PERB's determination declaring its obligation to implement a collective bargaining agreement. An appeals court dismissed in favor of the PERB.[35] It reasoned that where the hearing officer's finding was supported by substantial evidence, his determination was proper. The officer had found that members of the school board's negotiating team failed to support ratification of the proposed agreement, thereby resulting in the district's voting against the contract.

A second school district in New York sought further review of an arbitrator's award which interpreted the term "total instructional load" in favor of the teachers' union. Judgment was affirmed in favor of the union.[36] An intermediate appellate court reasoned that in so far as the district lacked evidence demonstrating how the arbitrator's interpretation of the collective bargaining agreement was totally irrational or it was unable to sustain the heavy burden of demonstrating that it violated public policy, the award would be confirmed.

A school district sought further review of a ELRB determination that it committed an unfair labor practice by refusing to comply with an earlier arbitration award in favor of a teacher it was found to have improperly evaluated. An appeals court in Illinois affirmed in favor of the ELRB,[37] explicitly relying on the principle that, if possible, a court must construe an arbitration award as valid. The court concluded that since the award was drawn from the essence of the collective bargaining agreement it was proper.

Following an arbitration award which calculated teachers' weekly salaries on the basis of a thirty-nine, rather than a thirty-eight, week work-year, a school district sought further review. The Indiana Supreme Court affirmed.[38] Pointing out that an arbitration award should be set aside only if it violates one of the grounds specified by statute, the court concluded that the arbitrator's use of a thirty-nine week work-year was not an evident miscalculation of figures warranting the vacation or modification of the award.

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35. Board of Educ. for the City Sch. Dist. of Buffalo v. Buffalo Teachers Fed'n, 594 N.Y.S.2d 937 (N.Y. App. Div. 1993).

36. East Ramapo Teachers Ass'n v. East Ramapo Cent. Sch. Dist., 595 N.Y.S.2d 529 (N.Y. App. Div. 1993).

37. Board of Educ. of Community High Sch. Dist. No. 155 v. Illinois Educ. Labor Relations Bd., 617 N.E.2d 269 (Ill. App. Ct. 1993).

38. School City of East Chicago v. East Chicago Fed'n of Teachers, 622 N.E.2d 166 (Ind. 1993).

Even while supporting the general presumption in favor of arbitrability to resolve disputes over contractual interpretation, courts vacate awards where arbitrators exceed the scope of their authority or where the contract does not call for arbitration. This principle was illustrated in a brief intermediate appellate court ruling in New York. In reversing an award in favor of a teachers' union the court held that "[w]hen an arbitrator does not draw his conclusion from the agreement itself or goes beyond the contract to add a new provision, the arbitration award must be vacated."[39]

Similarly, a school district in Pennsylvania successfully challenged an arbitration award ordering the reinstatement of two teachers who had been suspended due to a decrease in pupil enrollment.[40] The court reasoned that deference to arbitration notwithstanding, the initial determination of the existence of a basis for the suspension of teachers was not arbitrable under the collective bargaining agreement. Consequently, the award was reversed since it was not drawn from the essence of the contract.

The final two cases in this subsection ruled against the presumption of arbitrability. A teacher's association sought further review after the dismissal of its suit to compel arbitration over a school board's decision to eliminate a lay readers program. The Montana Supreme Court affirmed in favor of the board.[41] It found that since the state's collective bargaining statutes for public employees did not provide a basis for requiring arbitration over the elimination of a program and the operative agreement did not address the issue, the board's decision was inarbitrable.

A school board in Illinois sought further review of a determination by the ELRB that it committed an unfair labor practice by refusing to comply with an arbitrator's decision stemming from the unsatisfactory rating given to a teacher. Judgment was reversed in favor of the board.[42] An appeals court concluded that the dispute was inarbitrable since the evaluation plan in question had not been agreed upon as a result of a collective bargaining agreement.

Who Determines

In the first of three Pennsylvania cases, an appellate tribunal reversed a trial court's decision to stay arbitration proceedings in connection with the discharge of a teacher for cause.[43] The court found that where the operative agreement did not expressly permit or preclude arbitration, the initial determination of arbitrability was for the arbitrator. Therefore the trial court was found to have erred because it lacked the authority to grant a stay.

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[39] Hunsinger v. Minns, 602 N.Y.S.2d 284, 285 (N.Y. App. Div. 1993).

[40] North Star Sch. Dist. v. North Star Educ. Ass'n, 625 A.2d 159 (Pa. Commw. Ct. 1993).

[41] Missoula County High Sch. Educ. Ass'n v. Board of Trustees, Missoula County High Sch., 857 P.2d 696 (Mont. 1993).

[42] Board of Educ. of Du Page High Sch. Dist. No. 88 v. Illinois Educ. Labor Relations Bd., 617 N.E.2d 790 (Ill. App. Ct. 1993).

The next two cases relied on the principle enunciated in the previous ruling. In the first case an appeals court in Pennsylvania affirmed a decision of the PLRB that a school district committed an unfair labor practice for refusing to proceed to arbitration over a leave of absence requested by a teacher who was elected to serve as vice president of the state education association.[44] The district contended that since the teacher's situation was not clearly covered by the operative bargaining agreement, it was not required to proceed to arbitration. The court reasoned that where the arbitrator had the authority to determine that the dispute was within the scope of grievance arbitration procedures, the district had no choice but to comply.

In the final Pennsylvania case an appeals tribunal reversed a trial court ruling in favor of a school district which refused to proceed to arbitration.[45] The district refused to arbitrate whether its decision to furlough teachers or place them on part-time status violated the operative bargaining agreement. The court supported the PLRB's determination that unless it is certain that parties have refused to submit a dispute to arbitration, a trial court lacks the authority to grant a stay.

A Wisconsin case involved a school district's request for further review after it was found to have breached its fiduciary duty by failing to transfer tax sheltered annuity carriers' funds withheld from teachers' biweekly paychecks in a timely manner. Judgment was reversed in favor of the district.[46] An appeals court reasoned that since the exclusive remedy for the dispute was contained in the grievance and arbitration provision in the parties' collective bargaining agreement, the trial court lacked the authority to hear the case.

In the first of two Ohio cases the union representing school employees filed an unfair labor practices charge after the school board eliminated thirty-five educational assistant positions and, without any prior bargaining, signed a contract with an outside agency to provide a driver's education program. The SERB dismissed the claim and a trial court rejected an appeal for the lack of subject matter jurisdiction. An appeals court reversed in favor of the union.[47] It held that even though the alleged unfair labor practice occurred in a county other than where the appeal was filed, the action should not have been dismissed. The court reasoned that since the union had an office in the county where the trial court was located, it had the requisite authority to review the SERB's determination.[47]

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[43] Phoenixville Area Sch. Dist. v. Phoenixville Area Educ. Ass'n, 624 A.2d 1083 (Pa. Commw. Ct. 1993).

[44] Central Bucks Sch. Dist. v. Central Bucks Educ. Ass'n, 629 A.2d 196 (Pa. Commw. Ct. 1993).

[45] Chester Upland Educ. Ass'n v. Pennsylvania Labor Relations Bd., 631 A.2d 723 (Pa. Commw. Ct. 1993).

[46] Racine Educ. Ass'n v. Racine Unified Sch. Dist., 500 N.W.2d 379 (Wis. Ct. App. 1993).

Where an elementary school teacher in Ohio unsuccessfully brought an action against her union claiming a breach of its duty of fair representation following the nonrenewal of her limited teaching contract, she sought further review. Judgment was affirmed in favor of the union.[48] An appeals court reasoned that the dismissal was proper because the teacher's claim, based on an interpretation of her rights under the bargaining agreement, was within the exclusive subject matter jurisdiction of the SERB.

Finally, a school district in Illinois sought further review of the dismissal of both counts in its complaint against a special education district for a lack of subject matter jurisdiction. The case is discussed in this chapter because the teachers' union in the defendant special education district had been joined as a party to the first count. An appeals court affirmed in favor of the special education district.[49] It held that where the first district's declaratory judgment claim sought to determine its rights and those of the defendant district, the trial court properly dismissed both claims due to the lack of subject matter jurisdiction. In order for the controversy to have been justiciable, it would have to have been between the district and the union so as to have been subject to the exclusive jurisdiction of the ELRB.

Procedural Issues

Even though procedural matters are typically not dispositive of the underlying issues involved in arbitration, they can have a significant impact on their outcome. The variety of cases presented here provide ample evidence of the importance of following proper procedures in disputes involving collective bargaining.

Where a teacher's union successfully brought suit to compel arbitration over the dismissal of one of its members, the school district sought further review. The Supreme Court of Montana affirmed in favor of the union.[50] It held that the doctrine of election of remedies did not preclude

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47. State Employment Relations Bd. v. Akron City Sch. Dist. Bd. of Educ., 615 N.E.2d 711 (Ohio Ct. App. 1992).

48. Gallant v. Toledo Pub. Sch., 616 N.E.2d 1156 (Ohio Ct. App. 1992).

49. Barrington Community Unit Sch. Dist. No. 220 v. Special Educ. Dist. of Lake County, 615 N.E.2d 1153 (Ill. App. Ct. 1993).

50. Frazer Educ. Ass'n v. Board of Trustees, Valley County Elementary Sch. Dist. No. 2, 846 P.2d 267 (Mont. 1993).

the union from seeking arbitration because under the terms of the operative collective bargaining agreement it was a grievable issue. Furthermore, the court reasoned that the union's action was permissible because even though the teacher had initiated the distinct statutory appeals process, the two remedies were consistent and cumulative.

A tenured school administrator filed lawsuits challenging his demotion on the basis of unsatisfactory job performance. The first claimed that pursuant to the negotiated agreement between the district and his education association, he was entitled to arbitration; the second sought damages and injunctive relief. After both suits were dismissed, the administrator sought further review. In a consolidated appeal the Supreme Court of Alaska reversed in part and affirmed in part.[51] It reversed the dismissal for failure to exhaust administrative remedies since the trial court had not made a determination of whether the administrator was even entitled to arbitration. However, the court affirmed the dismissal in the second action; it reasoned that in accepting a new position in another district the administrator lacked standing since he did not demonstrate a sufficient personal stake in the outcome to ensure the requisite adversity.

Teachers who sent letters, on school stationery, critical of proposed budget cuts, were condemned by the school board. They subsequently sought further review of a decision that the board had not violated the State Open Meetings Law and Public Records Act in denying the teachers information about their grievance. The Supreme Court of Vermont reversed in favor of the educators.[52] It noted that even if the trial court had based its decision on the labor contract provision between the board and its teachers' association which made grievances confidential, its decision would still have been improper because the agreement could not override state statutes. Accordingly, the court required the district to allow the teachers to inspect the disputed documents.

An Ohio case involved an appeal by the representative of school employees whose petition for a representation election had been dismissed both by the SERB and a trial court for lack of subject matter jurisdiction. Judgment was reversed and remanded in favor of the representative.[53] An appeals court reasoned that in so far as the initial dismissal of the petition by the SERB on procedural grounds decided "private" rights and was not "ministerial in nature," it was appealable even though its action was without prejudice.

A board of education sought further review after its application to vacate an arbitration award calling for the reinstatement of an employee was dismissed on the ground of improper service of process. An appeals court in Connecticut affirmed in favor of the union.[54] It held that since the board served process on the Secretary of State, rather than on three explicitly identified officers, all of whom lived in state, the suit was dismissed properly. The court reasoned that service could be made in this manner only if the proper parties to be served lived out of state.

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[51] Kleven v. Yukon-Koyukuk Sch. Dist., 853 P.2d 518 (Alaska 1993).

[52] Trombley v. Bellows Falls Union High Sch. Dist. No. 27, 624 A.2d 857 (Vt. 1993).

[53] Springfield City Sch. Support Personnel v. State Employment Relations Bd., 616 N.E.2d 983 (Ohio Ct. App. 1992).

A teacher who was hurt while rearranging classroom furniture and was denied "injury in the line of duty" status after arbitration, filed suit to vacate the arbitration award. An intermediate appellate court in New York affirmed the dismissal of her action.[55] It reasoned that where the teacher was represented by the union at the arbitration proceeding she lacked standing to challenge the award in her individual capacity.

Judicial Review

Judicial deference to arbitration notwithstanding, a significant number of disputes over collective bargaining agreements are taken directly to court to seek review of decisions reached by arbitrators and employment relations boards. The cases in this section are grouped in four categories: salary and benefits, reduction-in-force, reassignment, and dismissal/nonrenewal.

Salary and Benefits

An education association requested further review of the dismissal of its action against a school board; the lawsuit sought to set aside a pay freeze and to recover back pay. The Supreme Court of Alabama affirmed in favor of the board.[56] It reasoned that the board complied with the statute requiring consultation with the education association prior to adopting written policies by placing its proposed action on the agenda of a meeting between the parties. The court thus found the board's action to be proper because it was required neither to obtain the association's agreement nor to negotiate it before putting the freeze into effect.

Similarly, a school board in Florida sought further review of a determination by the Public Employees' Relations Commission that it committed an unfair labor practice by freezing salaries without negotiating with the teachers' representative. Judgment was reversed in favor of the district.[57] An appellate court found that the negotiations pursuant to the reopen provision in the operative bargaining agreement do not remove a school board's protection relating to salary provisions. Consequently, since the board's actions were dictated by legislative underfunding of education, it was not liable for an unfair labor practice when it froze teachers' salaries.

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[54] Board of Educ. of Wallingford v. Local 1182, Dist. 1, Communications Workers of Am., 626 A.2d 1314 (Conn. App. Ct. 1993).

[55] Sampson v. Board of Educ. of the City of N.Y., 594 N.Y.S.2d 264 (N.Y. App. Div. 1993).

[56] Huntsville Educ. Ass'n v. Saunders, 612 So. 2d 410 (Ala. 1992).

A disagreement in contractual interpretation between a school district and the Public Employee Labor Relations Board (PELRB) focusing upon whether the district was required to increase the salaries of its educators according to the schedule in an expired collective bargaining agreement was appealed to the Supreme Court of New Hampshire.[58] The court reversed in part and affirmed in part. On the issue of not having to follow the expired salary scale, the court reversed in favor of the board. It reasoned that since the disputed automatic renewal clause was a cost item but was never approved by the town's legislative body, the district could not bind the town to future appropriations contained in the clause. However, the court also partially affirmed in favor of the PELRB, finding that because the provision guaranteeing teachers relief from mandatory lunch supervisory duties was not a benefit requiring approval of a legislative body, it remained in effect despite the expiration of the agreement.

A school district sought further review after the Department of Industry, Labor and Human Relations determined that it had improperly refused to substitute paid leave for unpaid leave under the State Family and Medical Leave Act. The Supreme Court of Wisconsin affirmed in favor of the Department.[59] It found that since the leave provision of the collective bargaining agreement was consistent with the statute, a teacher was entitled to back pay and attorney fees resulting from his request for leave when he learned that a child would be placed with his family for adoption.

Reduction-in-force

In the first of three Connecticut cases on reduction-in-force (RIF), a teacher whose contract was terminated due to a work force reduction sought further review of a ruling in favor of the school board. The Supreme Court of Connecticut affirmed.[60] It reasoned that since substantial evidence supported a finding that the board did not breach the bargaining agreement by failing to establish a second special teaching team where the terms of the contract spoke of teams, the board was not prevented from relying upon an amended agreement to terminate the teacher's employment.

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[57] School Bd. of Martin County v. Martin County Educ. Ass'n, 613 So. 2d 521 (Fla. Dist. Ct. App. 1993).

[58] Appeal of Milton Sch. Dist., 625 A.2d 1056 (N.H. 1993).

[59] Richland Sch. Dist. v. Department of Indus., Labor and Human Relations, Equal Rights Div., 498 N.W.2d 826 (Wis. 1993).

[60] Tomlinson v. Board of Educ. of Bristol, 629 A.2d 333 (Conn. 1993).

A vice-principal whose employment was terminated by a board of education as part of a RIF appealed the dismissal of his wrongful termination suit. An appellate tribunal in Connecticut reversed in favor of the administrator.[61] It found that the board violated the tenure statute by terminating the vice-principal's employment despite the lack of a provision in the collective bargaining agreement or a written policy governing such a circumstance. Consequently, he was entitled to reinstatement with back pay.

A teacher who served as a library media specialist and was certified as an administrator sought further review of a judgment dismissing his appeal of the board of education's decision to terminate his employment as part of a RIF. An appeals court in Connecticut affirmed in favor of the board.[62] It held that the teacher was not entitled, under the applicable statute, to bump an administrator of lesser seniority when he lost his job due to a RIF and there were no teaching positions to which he could have been assigned under the bargaining agreement. The court reasoned that if it were to order the teacher reinstated, it would have interfered with the board's role in developing and implementing educational policy.

A teacher who lost her full-time position but was recalled to a part-time job sought further review of the dismissal of her suit challenging the school board's action. Judgment was affirmed in favor of the board.[63] An appeals court in Ohio concluded that since the teacher's association received sufficient notice of the proposed RIF pursuant to the terms of their collective bargaining agreement, the district had not violated the terms of the contract.

Similarly, a teacher in Indiana who lost her job due to a RIF appealed the dismissal of her suit. An appellate tribunal affirmed in favor of the board.[64] It reasoned that the board's action was proper because the sequence of dismissal was based on objectively verifiable criteria which did not diminish the rights of tenured teachers and its method of maintaining seniority lists was in accord with the terms of the bargaining agreement.

The board of education in the District of Columbia sought further review when the union representing school and other governmental employees obtained a preliminary injunction preventing furlough days, barring within-grade pay increases, and prohibiting the accrual of time in grade pursuant to appropriations legislation. Judgment was reversed in favor of the board.[65] An appellate tribunal reasoned that because the contested provisions became operative through appropriations legislation enacted exclusively by Congress, they were not subject to contract clause review for allegedly violating the terms of the collective bargaining agreement.

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[61] Theriault v. Board of Educ. of Bloomfield, 626 A.2d 781 (Conn. App. Ct. 1993).

[62] Trotta v. Board of Educ. of Plymouth, 628 A.2d 1343 (Conn. App. Ct. 1993).

[63] State *ex rel.* Van Dorn v. Mt. Gilead Exempted Village Sch. Dist., 604 N.E.2d 239 (Ohio Ct. App. 1992).

[64] Piquard v. Board of Educ. of Pekin Community High Sch. Dist. No. 303, 610 N.E.2d 757 (Ill. App. Ct. 1993).

Tenured non-Native American teachers appealed a school district's decision to place them on unrequested leaves of absence while less senior Native American colleagues retained their jobs under the provisions of the American Indian Education Act. An appeals court in Minnesota affirmed the board's decision while striking down part of its rationale.[66] It found that the collective bargaining agreement had to be construed to incorporate the law at the time when the master contract was signed and not when individual teachers obtained tenure. Therefore, since the Act was enacted prior to the formation of the master agreement, the contracts of more senior non-Native American teachers were not impaired when less senior Native Americans were retained. However, the court reversed that part of the district's decision which relied upon suggested conditions from a granting agency to justify the violation of the state teacher tenure statute.

Reassignment

A board of education sought further review after the ELRB determined that it committed unfair labor practices against three teachers. An appeals court in Illinois reversed in favor of the board.[67] It ruled that the involuntary transfers of two teachers who had disagreements with their principal over teaching evaluations were proper. Despite the teachers' claims to the contrary, the court found that the board did not act in retaliation for protected union activities where one teacher made inappropriate comments to the principal and the other would have been transferred regardless of her involvement with the union. It also ruled in favor of the board on its placement of a letter in the employment file of a third teacher. The court concluded that the board had the authority to place such a letter in the teacher's file because the critical remarks she voiced to colleagues about clinical supervision were not made in the context of protected union activities.

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[65] District of Columbia v. American Fed'n of Gov't Employees, 619 A.2d 77 (D.C. 1993).

[66] Krueth v. Independent Sch. Dist. No. 38, Red Lake, 496 N.W.2d 829 (Minn. Ct. App. 1993).

[67] Board of Educ. of Schaumberg Community Consol. Sch. Dist. No. 54 v. Illinois Educ. Labor Relations Bd., 616 N.E.2d 1281 (Ill. App. Ct. 1993).

Dismissal/Nonrenewal

A teacher in Washington sought further review of a hearing officer's determination that sufficient cause existed to terminate his employment. While on school grounds, the teacher, who also operated a grocery store, bruised the arm of a ten-year-old student he had grabbed and accused of stealing from his business. An appeals court affirmed the teacher's dismissal.[68] It reasoned that where the collective bargaining agreement did not prohibit the use of evidence of prior alleged misconduct by the teacher, the hearing officer did not err in reaching his decision.

Where the employment contract of a nontenured teacher was not renewed after his third year of employment, he challenged the school board's decision. The board's action was affirmed.[69] An appeals court in Ohio held that since the school board and union agreed to continue to operate under the terms of their lapsed collective bargaining agreement, rather than the statutory provisions, the board's decision not to renew the teacher's contract based on provisions in the contract was proper.

A former probationary school safety officer whose employment was terminated due to poor performance evaluations, sought further review of the dismissal of a proceeding he initiated to compel a school board to reinstate him. An appeals court affirmed in favor of the board.[70] It reasoned that where the collective bargaining agreement did not authorize a hearing on the discharge of a probationary employee, the board acted properly since the reasons for his dismissal were not arbitrary, capricious, or in bad faith.

Strikes and Sanctions

In both of the actions involving work stoppages in education, the rights of teachers to strike were protected. In the first case, teachers and their school district cross appealed from a ruling which upheld the firing of the educators for striking, but denying the district's claims of tortious interference with the contracts of nonstriking educators.[71] The Supreme Court of Colorado reversed in part and affirmed in part.[72] In reversing it not only found that the teachers had a qualified right to strike, but also that their actions did not constitute the abandonment of their jobs. Consequently, the court remanded for further proceedings consistent with its finding that the district violated the Teacher Tenure Act by holding *ad hoc* hearings at which the teachers were dismissed. It also affirmed that part of the lower court's ruling which found that the lawfully striking teachers had not tortiously interfered with the contracts of their colleagues.

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[68] McCorkle v. Sunnyside Sch. Dist. No. 201, 848 P.2d 1308 (Wash. Ct. App. 1993).

[69] Young v. Washington Local Sch. Dist. Bd. of Educ., 619 N.E.2d 62 (Ohio Ct. App. 1993).

[70] Guilbe v. New York City Bd. of Educ., 597 N.Y.S.2d 164 (N.Y. App. Div. 1993).

[71] Martin v. Montezuma-Cortez Sch. Dist. RE-1, 809 P.2d 1010 (Colo. Ct. App. 1990). *See* THE YEARBOOK OF EDUCATION LAW 1992 at 58 for a full discussion of this case.

[72] Martin v. Montezuma-Cortez Sch. Dist. RE-1, 841 P.2d 237 (Colo. 1992).

Similarly, the constitutionality of the Pennsylvania statute which allows public school teachers to strike was challenged. After an intermediate appellate court struck the law down, a teachers' association sought further review. The Supreme Court of Pennsylvania reversed, upholding the constitutionality of the statute.[73] The court reasoned that since the legislature was the appropriate body to make a determination of whether the statute worked well or poorly, as intended, or in ways unforeseen, there was no reason why it should have been declared unconstitutional.

Miscellaneous Decisions

While many of the cases in this chapter can fit into more than one section, some rulings seem to defy classification altogether. Consequently, the following three decisions examine disputes that do not fit under any other heading.

A newspaper sought further review of the dismissal of its declaratory judgment action challenging the statutory collective bargaining strategy exception to the State Open Meeting Law. The Supreme Court of Montana reversed in favor of the newspaper.[74] It reasoned that since public meetings could be closed only when the need for individual privacy exceeds the merits of public disclosure and collective bargaining does not present such a situation, the exception was inconsistent with the right to know provision of the state constitution. Thus, the provision was struck down as unconstitutional.

The union representing teachers sought further review of the dismissal of an unfair labor complaint it filed when the school committee refused to execute a bargaining agreement allegedly agreed upon orally by the negotiators of both parties. The Supreme Court of Rhode Island affirmed in favor of the school committee.[75] It reasoned that apparent authority or estoppel notwithstanding, the negotiating team could not bind the committee to an agreement where the team's action contravened the specific instructions limiting its authority. Hence the committee did not have an obligation to reduce the purported oral agreement to writing.

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[73] Reichley v. North Penn Sch. Dist., 626 A.2d 123 (Pa. 1993).

[74] Great Falls Tribune Co. v. Great Falls Pub. Sch., Bd. of Trustees, 841 P.2d 502 (Mont. 1992).

[75] Warwick Teachers' Union Local 915 v. Warwick Sch. Comm., 624 A.2d 849 (R.I. 1993). For a related dispute between the parties, *see* Warwick Sch. Comm. v. Warwick Teachers' Union, 613 A.2d 1273 (R.I. 1992). *See* THE YEARBOOK OF EDUCATION LAW 1993 at 50 for a full discussion of this case.

A school district, acting on the basis of the State Sunshine Act, sought further review of the denial of its preliminary injunction challenging the authority of the PLRB to resolve unfair labor practices charges filed against it.[76] In a decision that took more than a year and one half to hand down, the Pennsylvania Supreme Court affirmed the dismissal.[77] The court reasoned that since the entire Sunshine Act had already been declared invalid, the district could not rely upon the limitations the Act sought to place on the PLRB to enjoin it from deciding the pending unfair labor practices claims.

Conclusion

Although no new legal trends or principles on the substantive or procedural aspects of collective bargaining emerged in 1993, neither did courts do anything to diminish the status of bargaining as a significant aspect in educational labor relations. Also, consistent with past years, the overwhelming majority of bargaining cases were resolved in state, rather than federal, courts. Thus, labor, management, and the courts were apparently content to maintain a status quo that relied on well established precedents which recognized bargaining as occupying a major role in the life of school districts and their educational personnel. Moreover, given the existence of liberal collective bargaining laws in such states as New York, Ohio, and Pennsylvania, there is no reason to expect that the steady supply of new, if unspectacular, cases on a wide array of topics involving bargaining will evaporate any time soon.

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[76] West Shore Sch. Dist. v. Pennsylvania Labor Relations Bd., 570 A.2d 1354 (Pa. Commw. Ct. 1990). *See* THE YEARBOOK OF EDUCATION LAW 1991 at 63 for a full discussion of this case.

[77] West Shore Sch. Dist. v. Pennsylvania Labor Relations Bd., 626 A.2d 1131 (Pa. 1993).

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PUPILS

Henry S. Lufler, Jr.

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Introduction

Substantive rights cases continued to grow in number in 1993 with an increasing number of federal courts addressing requests from plaintiffs that space be made available for religious groups wishing to use school facilities. A large number of other First Amendment religious rights cases addressed requests by parents and organized groups seeking to distribute religious publications in the schools. In general, attempts by schools to exclude religious groups and messages met with less success than in previous years. In the final section of the chapter, desegregation cases continued to decline in volume, with courts of appeal finding fewer errors in lower court decisions. Overall, school districts are finding it easier to obtain judicial approval for desegregation remedies.

Public School Assignment, Tuition, and Transportation

Home Instruction

State statutes regulating home instruction vary widely. They range from those that sharply limit the practice, such as requirements that only certified teachers provide the instruction, to those that place virtually no limit, such as regulations requiring parents only to notify their local district that they are educating their children at home. In the middle are states that require periodic standardized testing of home instruction pupils or the reporting of lesson plans.

Litigation arguing that states lack the authority to regulate home instruction almost always has been unsuccessful. Several 1993 cases demonstrate this point. Some recent cases, however, show a shift in strategy, with home instruction advocates accepting the basic principle that states have the right to regulate. Instead, they now assert that states can satisfy their duty to ensure that all children are educated through less restrictive regulations. This new approach has been more successful.

Attacking the state's right to regulate. West Virginia parents argued in federal court that their state's testing requirement violated their constitutional right to control their child's education. After three years of home schooling, their son's standardized test scores fell from the 62nd percentile to the 17th and then rose to the 38th. A state statute requires that home instruction parents return their child to the public schools after two years of below-40 test scores. The district court upheld the statute in the face of the parents' liberty interest and equal protection arguments, finding that the test requirement satisfied the state's interest in guaranteeing that all children receive an education.[1] Courts never have held that parents have an unlimited right to control the education of children.

Iowa parents challenged a state requirement that they report their home instruction curriculum to their local school district, claiming that it violated their right to the free expression of their religious beliefs.[2] The home instruction curriculum had to detail the ways a series of educational standards would be met. Iowa's highest court rejected the parents' claims, upholding their misdemeanor convictions and concluding that without monitoring the curriculum standards would be an abdication of the state's responsibility to see that children are educated.

Three Michigan cases decided by that state's supreme court addressed the requirement that home instruction be provided by certified teachers and the question of when home instruction programs could be classified as "private schools." In the first case, the Michigan court reminded the plaintiffs that no case had ever established the right of parents to control the education of their children unfettered by any state regulations. The court therefore upheld the licensed teacher requirement in the face of the substantive due process claim.[3] The convictions of the parents were vacated, however, because they claimed to be operating a private school in their home and the required hearing by the state superintendent before a private school can be closed had not been held. Because private schools in Michigan also are required to use certified teachers, the court's decision ultimately did not affect the certification regulation.

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[1] Null v. Board of Educ. of County of Jackson, 815 F. Supp. 937 (S.D. W. Va. 1993).

[2] State v. Rivera, 497 N.W.2d 878 (Iowa 1993).

A second Michigan case also upheld the certification requirement and state curriculum mandates in the science and social science areas.[4] While agreeing with the plaintiffs' claim that a set of state home instruction "compliance procedures" had never been promulgated as rules, and therefore could not be enforced as if they had been, the court nevertheless held that the state could proceed to enforce the curriculum and certification requirements. Using the statutory provision, the court found that home schools were schools "other than public schools" under Michigan law and therefore were subject to all the provisions of the state's nonpublic school code. The court also held that home schools, like other private schools, were not subject to the 180-day school year requirement of the public schools.

Finally, Michigan's court forged an exception to the home instructor certification requirement, finding that families whose sincere religious beliefs prohibit the use of certified instructors could not be compelled to follow the requirement.[5] A lower court in the case had concluded that the plaintiff's opposition to the requirement "beyond question" was religiously motivated, but had concluded that there could be no religious exception. The Michigan court disagreed, finding that the certified teacher requirement was not essential in fulfilling a compelling state interest in the face of the defendants' First Amendment claims.

Parents in North Dakota were prosecuted when, after operating their home instruction program as a "private school" for six years, they refused to comply with a newly-passed home instruction provision of the statutes. The state responded by seeking to make the parents comply with school state fire and safety codes for private schools and a lawsuit followed. The court concluded that, in fact, home instruction programs could be run under either the home instruction or private school provisions because neither referred to the other and therefore they constituted

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[3] People v. Bennett, 501 N.W.2d 106 (Mich. 1993).

[4] Clonlara, Inc. v. State Bd. of Educ., 501 N.W.2d 88 (Mich. 1993).

[5] People v. DeJonge, 501 N.W.2d 127 (Mich. 1993).

"equal alternatives."[6] The court also found a loophole in the state building code that allows instruction to occur in a noncomplying building when the instruction is incidental to the building's principal purpose. Instruction was classified by the court as an "incidental use" of the home.

The Texas State Education Agency had decided, in 1981, that home instruction parents could not qualify as private schools, and 150 prosecutions had resulted before a lawsuit was filed in 1985. The class action suit was filed by home school parents and providers of curricular materials for the parents. The lawsuit argued that home instruction programs should be considered as private schools.[7] The court agreed. In considering the case, the court first observed that private schools in Texas are not under the jurisdiction of the state educational agency and are not regulated in any way. In fact, the state code requires private schools only to teach good citizenship and to have their instruction "based on the English language." To require more of home instruction programs, the court reasoned, would deprive the home instruction parents of their equal protection rights. The court upheld the awarding of $360,000 in attorney fees for the plaintiffs.

Finally, a father whose former wife had custody of their children, filed suit to compel the mother to return them to the public schools after she began educating them at home.[8] Overturning a lower court, the appeals court concluded that the standard for reversing a custodial parent's educational decision was extremely high and could be contemplated only on a showing that some harm to the child was resulting.

Compulsory Attendance

A Florida appeals court considered the case of a child who had missed school for forty-six days. Under Florida statutes, school administrators may file a petition seeking to have an habitual truant declared to be in need of services, thereby resulting in the appointment of a guardian for the child.[9] The school's petition, however, was challenged by the Florida Department of Health and Rehabilitative Services, which asserted that statute changes had given it the sole power to seek guardianships. While finding the conflicting statutes to be "no model of clarity," the court concluded that the power of the school district had not been superseded.[10] The mother had not contested the school district's action establishing the guardianship.

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[6] Birst v. Sanstead, 493 N.W.2d 690 (N.D. 1992).

[7] Texas Educ. Agency v. Leeper, 843 S.W.2d 41 (Tex. Ct. App. 1991).

[8] Rust v. Rust, 864 S.W.2d 52 (Tenn. Ct. App. 1993).

[9] FLA. STAT. ch. 232.19(3)(a)(1991).

[10] Department of Health and Rehabilitative Servs. v. Superintendent of Sch. for Seminole County, 618 So. 2d 331 (Fla. Dist. Ct. App. 1993).

A mother convicted in a jury trial of failing to cause her daughter to attend school filed suit alleging that the Wisconsin statute under which she was convicted failed to define the phrase "attend school regularly." It was not contested that the girl had been charged with truancy eight times and that the mother had received warning letters about the problem. The mother's misdemeanor conviction was upheld on appeal, with the court finding that a person of ordinary intelligence would understand the meaning of the term "regularly," and that the school district had followed the elaborate statutory provisions of Wisconsin law that must precede any action against truants or their parents.[11]

Transportation

Transportation cases in recent years have addressed issues related to decisions made by school districts facing budget shortfalls to charge for school bus service or to discontinue the practice altogether. Generally, state courts have upheld fee provisions containing indigent exclusions and have found bus service to be a supplemental service rather than an essential part of a school district's educational offerings.

In 1992 the Supreme Court of California upheld a lower court decision approving a law permitting the charging of fees for bus service.[12] Appellants challenging the fees persisted, however, arguing that the California high court's decision did not require the vacation of their second case that argued that parents were not being informed of their right to seek an indigency fee waiver and that some districts were not granting the waivers. An appeals court ruled in favor of those challenging the fee in this second case, finding that the uneven application of the waiver provision violated the California Constitution.[13] The court concluded that the wording of the statute required districts to grant waivers and did not limit the receipt of waivers to those who were receiving public assistance, a condition attached by one of the districts involved in the litigation.

The Supreme Court of Nebraska considered a case clarifying the powers of school boards to require fees for bus service where children lived in excess of four miles from their school.[14] The law made bus service optional for students living fewer than four miles away and permitted districts to charge a fee, but was not explicit on the question of fees for those living farther away. The Nebraska court concluded that school boards in that state could charge fees for all bus service.

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[11] State v. White, 509 N.W.2d 434 (Wis. Ct. App. 1993).

[12] Arcadia Unified Sch. Dist. v. State Dep't of Educ., 280 Cal. Rptr.2d 463 (Cal. Ct. App. 1991), *aff'd*, 5 Cal. Rptr. 2d 545 (1993). *See* THE YEARBOOK OF EDUCATION LAW 1993 at 62.

[13] Salazar v. Dawson, 18 Cal. Rptr.2d 665 (Cal. Ct. App. 1993).

[14] School Dist. of Waterloo, Douglas County v. Hutchinson, 508 N.W.2d 832 (Neb. 1993).

An Ohio school board needing to reduce expenditures in order to qualify for state loans to pay expenses decided to eliminate busing for secondary school students. Parents filed suit, claiming that the decision would result in a number of students being unable to attend school. A lower court found that the decision to cut busing was an abuse of discretion. This decision was overruled on appeal, with the appeals court concluding that savings would result from the service termination, providing a rational purpose for charging the fee, and that the school board had not exceeded its statutory powers.[15]

Private and Parochial Schools

Cases involving private schools almost always involve disputes regarding the contracts between parents and the schools. In the first of the four cases to be considered, a parent was two weeks late in notifying a school that his son would not be attending. A lower court had held that the tardy notice represented "substantial compliance" with the notice deadline, but the Ohio Supreme Court concluded that full payment was due.[16]

A Louisiana parent made several partial payments to the private school his son was attending, but ignored subsequent letters requesting the remaining compensation. The student continued to attend the school to the end of the year, at which point $8,000 in tuition was due. The school subsequently refused to issue a transcript to the student and sued for payment of the tuition balance. The appeals court hearing the case observed that the school had never indicated that the transcript might not be forthcoming and concluded that this failure to warn the father represented an implied promise that the student would receive credit for the year, notwithstanding the unpaid bill.[17]

Parents of several children enrolled in an Ohio private school brought suit after their children were expelled and their tuition money was refunded. The dispute focused on the way the school had handled several disciplinary incidents involving the plaintiffs' children. The court concluded that the parents themselves had failed to follow the school's handbook, which contained procedures for handling such differences of opinion, further observing that the school had made extraordinary efforts to deal with the contentious parents.[18] The school was found to have properly expelled the students.

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15. Russell v. Gallia County Local Sch. Bd., 610 N.E.2d 1130 (Ohio Ct. App. 1992).
16. Lake Ridge Academy v. Carney, 613 N.E.2d 183 (Ohio, 1993).
17. McKee v. Southfield Sch., 613 So. 2d 659 (La. Ct. App. 1993).
18. Allen v. Casper, 622 N.E.2d 367 (Ohio Ct. App. 1993).

An Illinois district court considered an unusual case involving the disciplining of African-American students attending an all-girl Catholic high school.[19] Plaintiffs in the case alleged that their expulsions for portions of a semester for fighting were more excessive than white students had received for fighting and that the school had not followed the disciplinary procedures contained in the school contract. The fight began when one of the students who subsequently was expelled insulted another student about her recently dyed hair. The conflict escalated into a lengthy donnybrook that involved injuries to several teachers who attempted to separate the students. While finding "equities on both sides," the court found unpersuasive the plaintiffs' evidence that minority students were more likely to be expelled at the school. Because the students involved had been given the opportunity to graduate, though with the loss of significant school privileges, the court refused to grant a restraining order against the school.

Substantive Rights of Students

Search and Seizure

Courts addressing cases involving warrantless searches of students rely on the United States Supreme Court's decision in *New Jersey v. T.L.O.*[20] The Court in *T.L.O.* applied a reasonable suspicion standard for school searches undertaken if school personnel believe that a school rule or law has been broken. The search that led to the Court's decision involved the discovery of drug sales when the assistant principal conducting the search opened a student's purse seeking evidence that the student had been smoking in a lavatory. Several cases decided in 1993, however, involved more intrusive searches, including three that addressed the propriety of student strip searches. As in previous years, courts continue to grant wide latitude to school officials to conduct searches, usually rejecting claims that reasonable suspicion to search was missing.

The Seventh Circuit Court of Appeals heard an appeal of a lower court summary judgment in favor of a school district in a strip search case brought under 42 U.S.C section 1983.[21] The search was conducted after school officials received a report from a teacher that the student was "crotching" drugs, hiding the contraband in his underwear. The student was taken to the boy's locker room where he was asked to remove his clothes and put on a gym uniform. The school officials searched the clothes and visually inspected the student's nude body, finding no drugs. Following *T.L.O.*, the Seventh Circuit considered the student's previous suspected drug use, including reports by his school bus driver and other students that he was smoking marijuana. This, the court concluded, gave school authorities a basis for the search after receiving the teacher's report. In addition to denying the plaintiff's claim of a federal substantive rights violation, the court also refused to conclude that the school was liable for failing to develop more complete written procedures for dealing with such incidents.

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[19] Parker v. Trinity High Sch., 823 F. Supp. 511 (N.D. Ill. 1993).
[20] New Jersey v. T.L.O., 469 U.S. 325 (1985).
[21] Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993).

An Ohio district court also upheld the reasonableness of a strip search in which a student was asked to remove his clothes and pull the shorts he was wearing tightly around his crotch so that two male security guards could see if drugs were being concealed.[22] No evidence of drugs was found. The search began when a teacher and an administrator detected what they thought to be the strong odor of marijuana on the student and found him to be "sluggish" and with dilated pupils. The court concluded that the search was reasonable.

West Virginia's highest court also considered a strip search, holding that the search was unreasonable even though the money that had been stolen from a teacher's purse was found.[23] The student accused of taking the money had a history of theft and was known to have been in the room where the teacher's unattended purse had been stored. The search, however, involved the principal looking closely while the student pulled open his underwear in the front and back. This, the court concluded, was "excessively intrusive," under the terms of *T.L.O.*

The Supreme Court of Wisconsin considered a case involving locker searches that focused on students known to the school to be frequent troublemakers. The searches were undertaken after a series of gun-related incidents in and around the school. The "semi-random" searches resulted in the discovery of a gun and drugs in a student's locker. The court concluded that the school's written policy regarding potential locker searches should have alerted students to the fact that they had no expectation of privacy in their lockers.[24] In dissent, one justice expressed concern about singling out certain groups of students for the searches.

Student search cases sometimes raise questions concerning the geographic scope of the school's authority. An Arizona case presented this issue when students were searched by school security guards two blocks from their school.[25] The search uncovered cocaine that resulted in a student's felony conviction. The guards were sent to the scene by the school's principal to investigate a reported fight in progress, thereby giving the court grounds to conclude that they were acting as school personnel when they conducted the search. Therefore, the court reasoned, the *T.L.O.* reasonable suspicion standard rather than probable cause was the ground under which the search should be judged. Using the less rigorous standard, the court found the search to be reasonable. The case is interesting because school search standards were used only in a criminal prosecution. School discipline was not an issue in the case.

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[22] Widener v. Frye, 809 F. Supp. 35 (S.D. Ohio 1992).
[23] State *ex rel.* Galford v. Mark Anthony B., 433 S.E.2d 41 (W. Va. 1993).
[24] Isiah B. v. State, 500 N.W.2d 637 (Wis. 1993).
[25] State v. Serna, 860 P.2d 1320 (Ariz. Ct. App. 1993).

A school security officer found drugs in a student's pocket when he conducted a pat-down search at the behest of the school's principal. When the case came to trial, however, prosecutors declined to present any evidence on why the principal suspected that the student possessed drugs. The court therefore concluded that it could not decide if the search was reasonable and the delinquency case against the student was dismissed.[26] In a New York case with the opposite result, a student was found to be a delinquent when he gave a security guard another student's jacket that had been reported stolen and the guard found drugs in the jacket pocket.[27]

A New Jersey case considered the propriety of searches of students' hand luggage prior to a voluntary class trip.[28] The permission slip signed by parents indicated that the search would take place. Plaintiffs in the case signed the permission slip for their son and nothing was found when his luggage was searched. Later, however, the parents filed suit alleging that the search was unreasonable. The appeals court used a variety of warrantless search cases upholding airport and courthouse searches, concluding that the school's policy on searches before field trips was reasonable, especially given the fact that prior warning is given and that no individual stigma attaches when every student's possessions are searched.

First Amendment Religious Rights

Schoolhouse doors opened wider for possible space rental by religious groups, and the distribution of religious tracts by students became easier, as the result of 1993 court decisions. The volume of religious rights cases continued at a high pace, with courts considering not only a number of space access and materials distribution cases but also multiple cases revisiting the question of student-directed prayers at high school commencements. Distribution of Bibles in schools, prayers before athletic events, and even the question of whether the Boy Scouts of America was a religious group also were argued.

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[26] A.J.M. v. State, 617 So. 2d 1137 (Fla. Dist. Ct. App. 1993).

[27] *In re* Ronnie H., 603 N.Y.S.2d 579 (N.Y. App. Div. 1993).

[28] Desilets v. Clearview Regional Bd. of Educ., 627 A.2d 667 (N.J. Super. Ct. App. Div. 1993).

The Supreme Court reviewed a New York school district's refusal to permit a church to use school facilities after hours to show a religion-oriented film on family values and child rearing. *Lamb's Chapel v. Center Moriches Union Free School District*[29] reached the Court after the Second Circuit held that the district had created a limited public forum with its space rental policy open only for "designated purposes," and that the exclusion of the church group was "viewpoint neutral." The church argued that the policy violated its members' First Amendment free speech rights.

The Supreme Court agreed that the policy, which applied only to religious groups, represented a content-based limit on speech. The Court relied on *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*,[30] which concluded that speakers could not be excluded from a nonpublic forum based solely on the speaker's viewpoint. In addition, while concurring opinions took issue with its use, the Court's opinion also applied the three-part test enumerated in *Lemon v. Kurtzman*,[31] concluding that a public rental of school space when the school was not in session could not be viewed as in any way representing an endorsement by the school of the views expressed in the film presentation. The Court's unanimous decision in *Lamb's Chapel* was used in a number of other 1993 First Amendment religion cases.[32]

The Ninth Circuit considered a case involving the use of school facilities by a student religious group seeking permission to meet during a before-school period when other clubs and groups met. In 1989 the Ninth Circuit had held that the use of the space by the religious group violated the establishment clause, but the decision was vacated and remanded by the Supreme Court.[33] The Court asked that the case be considered in light of its decision concluding that the Federal Equal Access Act[34] required schools not to discriminate against student religious groups if it provided meeting opportunities to other groups and clubs.[35]

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[29] Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993).

[30] Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1985).

[31] Lemon v. Kurtzman, 403 U.S. 602 (1971). In order for a challenged policy to avoid violating the establishment of religion clause the policy must have a secular purpose, must neither advance nor inhibit religion, and must not lead to excessive state entanglement with religion.

[32] The Supreme Court's reasoning in *Lamb's Chapel* was echoed in its decision invalidating Florida municipal ordinances that sought to prohibit a religious sect from killing and eating animals during a religious service. The Court found that the ordinances represented a content-based First Amendment violation because similar activities occurred in restaurants and elsewhere in the community. Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993).

[33] Garnett v. Renton Sch. Dist. No. 403, 675 F. Supp. 1268 (W.D. Wash. 1987), *aff'd*, 874 F.2d 608 (9th Cir. 1989), *vacated and remanded*, 496 U.S. 914 (1990).

[34] 20 U.S.C.A. § 4071 *et seq.* (West 1985).

After reviewing the case again, the district court once more ruled in favor of the school district, holding this time that the Washington State Constitution preempted the Access Act.[36] The Ninth Circuit reversed, agreeing with the district court that states could extend more constitutional protection than that mandated by federal acts or the Federal Constitution. What was at stake, however, was not the question of further protection but the issue of whether Congress could extend additional rights that might be in conflict with state constitutional provisions. On this point, the appeals court ruled that states could not abridge rights granted by the federal government and that the state constitution must yield.

A Wyoming school district denied a private group the right to rent school facilities for the purpose of holding a voluntary student baccalaureate service. The district did rent the facilities for other purposes, excluding only religious groups. A district court ruled that the rental policy represented content-based discrimination, using *Lamb's Chapel* and *Mergens* as authority.[37]

A Virginia district court heard a case involving a school system policy that charged religious groups more than other nonprofit groups for the rental of school facilities.[38] The policy required religious groups to pay the same rental for the first five years, but thereafter the rent escalated so that in the ninth year the religious group would be paying five times the regular nonprofit rate, or the same as commercial users of the space. The policy apparently was promulgated on the theory that the long-term rental of inexpensive space by religious groups would cause the school board to violate the establishment clause. The court rejected this analysis, holding that the district clearly had established an open forum by its rental policy and that the discriminatory rental rate violated the plaintiffs' First Amendment rights to free speech. The church will seek more than $200,000 in excess rent it paid under the disputed policy.

In a case decided earlier, but published in 1993, a Nevada federal court considered a case in which a school district had denied a church the opportunity to rent space on the ground that to do so would violate the establishment clause.[39] After discovering that the school district had rented its space to groups to hold Christmas programs clearly of a religious nature, the court granted summary judgment to the plaintiffs on equal protection grounds.

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[35] Board of Educ. v. Mergens, 496 U.S. 226 (1990).

[36] Garnett v. Renton Sch. Dist., 722 F. Supp. 531 (W.D. Wash. 1991).

[37] Shumway v. Albany County Sch. Dist. No. 1 Bd. of Educ., 826 F. Supp. 1320 (D. Wyo. 1993).

[38] Fairfax Covenant Church v. Fairfax County Sch. Bd., 811 F. Supp. 1137 (E.D. Va. 1993).

[39] Wallace v. Washoe County Sch. Dist. 818 F. Supp. 1346 (D. Nev. 1991).

In an interesting Detroit case, a variety of citizens filed a request for a preliminary injunction seeking to stop Louis Farrakhan, leader of the "Nation of Islam," from speaking at a fundraiser sponsored by a school. In addition to objecting to what they characterized as Farrakhan's racist views, the plaintiffs complained about the use of public funds involved in advertising the program. The court declined to issue the order, finding that the plaintiffs demonstrated no chance of convincing the court that the program was without secular purpose, under *Lemon*, nor that the plaintiffs would suffer any individual harm if the program went forward.[40] Instead, the plaintiffs were reminded that they could protest the talk's contents "in a legally acceptable manner."

Cases involving the distribution of religious materials in schools also were decided in 1993, with three of the cases addressed by the Seventh Circuit. In the case presenting the most complicated fact situation, several school policies formulated in part to respond to an eighth-grade student who sought to distribute religious pamphlets were considered by the appeals court.[41] A lower court decision had considered various elements of the policy written in 1990, including time and place requirements for materials written primarily by nonstudents, which the lower court found unreasonable, and an outright ban on religious materials, which the court affirmed.[42]

On appeal the school district continued its attempt to ban religious speech, trying to distinguish its policy from the holdings in *Mergens* and *Lamb's Chapel* by arguing that those cases applied only to religious speech after school hours. This argument was to no avail, with the Seventh Circuit concluding forcefully that the school could not ban religious speech merely because some students might conclude that the school in some way was sponsoring the pamphlets in question. Drawing a parallel between the distribution of materials and the wearing of protest buttons, which no one could suggest was other than an individual statement, the court suggested "the school's proper response in the face of confusion about religious tracts, is to educate the audience rather than squelch the speaker."[43] The appeals court affirmed the use of a school-established table for materials distribution and also concluded that students who wished to distribute more than ten copies of pamphlets could be asked to use only their own words or those of other students. This limit, the court reasoned, was appropriately related to the school's educational mission.

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[40] C.A.F.E. v. Detroit Bd. of Educ., 815 F. Supp. 1045 (E.D. Mich. 1993).

[41] Hedges v. Wauconda Community Unit Sch. Dist. 118, 9 F.3d 1295 (7th Cir. 1993).

[42] Hedges v. Wauconda Community Unit Sch. Dist. 118, 807 F. Supp. 444 (N.D. Ill. 1992). *See* The Yearbook of Education Law 1993 at 70.

[43] Hedges v. Wauconda Community Unit Sch. Dist. 118, 9 F.3d 1295, 1299 (7th Cir. 1993).

Distribution of Bibles by members of Gideon International met with less favor, with the Seventh Circuit concluding that the school policy permitting Bible distribution in the classroom violated the establishment clause.[44] The books were distributed in the presence of teachers and sometimes the principal. For the court, the presence of school officials made it almost impossible for the fifth-grade students receiving the Bibles not to conclude that the school was endorsing the religious message they contained.

The Seventh Circuit also heard an establishment clause challenge to a school district policy permitting the Boy Scouts of America to distribute materials to students and to use school facilities.[45] The plaintiffs in the case were a father and his student son who had been rejected for participation in scouting when they refused to sign the scout oath which required belief in God. In viewing the case, the appeals court considered the policy of the school permitting a variety of youth groups to distribute pamphlets to students. The court concluded that this common practice and the lack of any overtly religious message in the scout materials made it unlikely that any young student would confuse the materials with the school's endorsement of religion. In affirming a lower court's decision upholding the school's policies regarding the scouts, the appeals court also rejected the contention that the organization was a "state actor" for the purposes of Fourteenth Amendment liability.

The mother of a fifth-grade Florida student filed suit seeking an injunction to prevent a principal from interfering with the distribution of religious tracts by her daughter.[46] The pamphlet was written by Jews for Jesus and was entitled "Strange Facts About You, God, and Your Mother." In seeking the injunction, the plaintiff argued that the school's policy restricting materials to a designated location constituted an invalid prior restraint. The court declined to issue the injunction and reserved judgment on the school's policy until it had been argued fully.

Issues related to commencement prayers were also raised in 1993. Some cases in recent years have focused on the policy present in some school systems that permits graduating students to decide if they wish to have a commencement prayer. An Idaho federal court considered such a school policy, contrasting the school's policy in the case before it with the Rhode Island school district policy rejected by the Supreme Court in

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[44] Berger v. Rensselaer Cent. Sch. Corp., 766 F. Supp 696 (N.D. Ind. 1991), *rev'd*, 982 F.2d 1160 (7th Cir. 1993).

[45] Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township, 8 F.3d 1160 (7th Cir. 1993).

[46] Johnston-Loehner v. O'Brien, 837 F. Supp. 388 (M.D. Fla. 1993).

Lee v. Weisman.[47] In the Rhode Island case, the Court held that it was impermissible for school officials to decide if a prayer was to be included and to decide if its content met school guidelines. In the Idaho case, the district court concluded that *Lee* did not contain an absolute bar to prayer and that the policy of having students decide the question so reduced the role of the school system that the objectionable features of the Rhode Island school district policy had been overcome.[48]

In an interesting case related to school prayer, taxpayers in Utah brought suit alleging that the terms of their state constitution had been violated when their state superintendent of public instruction contributed $10,000 to the Providence School Committee to help fund their appeal in *Lee*. Plaintiffs also challenged Utah's decision to file an amicus brief in the case. In rejecting the plaintiffs' central argument, the Utah Supreme Court concluded that, "[t]o advocate the legality of a practice is not to fund that practice."[49] In addition to rejecting the contention that the financial support was used for prayer, the court found that the plaintiffs' claims flew in the face of the separation of powers doctrine, observing that it was appropriate for the executive branch to participate in litigation to help determine the constitutionality of contested policies.

The Eighth Circuit considered a preliminary injunction that had been issued by a district court banning students from reading prayers at a commencement ceremony.[50] The appeals court did not, however, address the substance of the case but instead vacated the injunction by concluding that the parties who brought the case lacked proper standing. The suit had been filed by taxpayers who were not residents of the school district and had expressed no interest in attending the graduation ceremony in question.

Prayers led by a girl's basketball coach at the end of games and at practices were accompanied by name calling which was directed at a player who refused to participate. A lawsuit followed, with a Texas district court issuing an injunction banning the prayers. The school district appealed to the Fifth Circuit, which affirmed, finding that the involvement of the coach made it impossible to see the prayers as anything but a school sponsored activity that violated the establishment clause. Observing that the Supreme Court had banned school-organized prayers in the classroom, the Fifth Circuit concluded that they could not possibly be permitted on the basketball court.

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[47] Lee v. Weisman, 112 S. Ct. 2649 (1992).

[48] Harris v. Joint Sch. Dist. No. 241, 821 F. Supp. 638 (D. Idaho 1993).

[49] Society of Separationists v. Taggart, 862 P.2d 1339, 1341 (Utah 1993).

[50] Friedmann v. Sheldon Community Sch. Dist., 995 F.2d 802 (8th Cir. 1993).

[51] Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160 (5th Cir. 1993).

A student gospel choir directed by a school secretary was enormously successful in attracting large audiences, but ran afoul of the provision of the Federal Equal Access Act that does not permit school sponsorship of any religious club.[52] The suit was filed by the Philadelphia school district when the secretary ignored district suggestions that she modify concert programs to reduce the number of religious songs. The plaintiff argued unsuccessfully that she was not acting in any official capacity when she met with the students. In rejecting this contention the court found that the Access Act clearly barred participation by staff in religious extracurricular activities.

A New Jersey school district policy required the hanging of calendars in classrooms on which dates of national, ethnic, or religious significance were highlighted. In December, for example, nine such holidays were represented, five of which had religious significance. Teachers were provided with materials that could be used for classroom instruction on the meaning and significance of the holidays. The stated purpose of the program was to promote a student's understanding of the nation's cultural and religious diversity. Students who had a religious belief that precluded such discussions were to be excused from participation.

Suit was filed challenging the inclusion of religious holidays on the calendar.[53] The district court used the three-part *Lemon* test to evaluate the curriculum and the use of the calendars, holding in strong terms that the policy had a secular purpose by fostering respect for religious diversity. "We learn this lesson not by being offended or threatened by the religious symbols of others, but by understanding the meaning of these symbols and why they have the capacity to inspire intense emotions."[54] Contrasting this case with others that had found similar school programs to violate the establishment clause, the court observed that the New Jersey district's policy was not a subterfuge to permit the celebration of Christmas, while paying scant attention to other religious holidays. The court also found that the calendar neither advanced nor inhibited religion, though it characterized the plaintiff's attempt to remove all mention of religion from the schools as potentially inhibiting. Finally, in upholding the calendar, the court found that it did not represent excessive government entanglement with religion.

A large portrait of Jesus that hung for many years outside a principal's office was the subject of litigation in a Michigan case.[55] The court found that the portrait served "primarily a religious purpose" and concluded that its presence in a prominent place in the central school corridor violated the establishment clause. Its removal was delayed to allow defendants in the case to appeal to the Sixth Circuit.

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[52] Sease v. School Dist. of Philadelphia, 811 F. Supp. 183 (E.D. Pa. 1993).

[53] Clever v. Cherry Hill Township Bd. of Educ., 838 F. Supp. 929 (D.N.J. 1993).

[54] *Id.* at 939.

[55] Washegesic v. Bloomingdale Pub. Sch., 813 F. Supp. 559 (W.D. Mich. 1993).

The creation of a school district coterminous with the boundaries of a private religious community by the New York legislature was challenged in the courts of that state. An appeals court ruled that the statute violated the establishment clause even though it had the secular purpose of allowing for special education services for children with disabilities who otherwise would not receive them.[56] On further appeal, New York's highest court affirmed, concluding that the symbolic union between church and state that was forged with the political compromise creating the district violated the First Amendment.[57] The court's opinion suggested that the state could have ensured the provision of needed services without the constitutional violation by arranging for them to be offered on a neutral site away from the religious community's schools.

Finally, another in a series of cases regarding chapter 1 of the Elementary and Secondary Education Act[58] was heard by a federal court of appeals. These cases involve an "off the top" provision that allows funds to be used to buy trailers or rent secular facilities in which students from parochial schools can receive the services. After the facilities are secured, the remaining funds then are divided between public and private schools. This practice, upheld in several other circuits, was affirmed by the Seventh Circuit.[59] The court held that the costs of avoiding an establishment clause violation should not be disproportionately assessed against the parochial school students, which would occur if the facilities were paid for after the funds were divided.

First Amendment Freedom of Expression

Recent cases involving expression in the public schools has focused on student appearance, including hair length and clothing alleged to be associated with gang membership. In addition, courts wrestled with the question of hair length for members of American Indian tribes and weighed a challenge to a high school graduation requirement forcing students to perform sixty hours of community service.

The community service requirement was attacked as denying the plaintiffs their right to free expression because it allegedly forced them "to espouse a belief in the value of altruism." A lower court granted summary judgment in favor of the school district and the plaintiffs appealed to the Third Circuit.[60] The program established by the district gave students a wide variety of community service options and permitted the creation of individual service programs if students were not interested in working with one of the more than seventy groups on the school's list. Students had to satisfy the requirement at some point during their four years in high school.

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[56] Grumet v. Board of Educ. of Kiryas Joel Village Sch. Dist., 592 N.Y.S.2d 123 (N.Y. App. Div. 1992).

[57] Grumet v. Board of Educ. of Kiryas Joel Village Sch. Dist., 601 N.Y.S.2d 61 (1993).

[58] 20 U.S.C. § 2701 *et seq.* (1988).

[59] Board of Educ. of Chicago v. Alexander, 983 F.2d 745 (7th Cir. 1992).

In viewing the requirement, the appeals court first looked generally at school coursework, finding that there were values implicit n most secondary instruction. Turning to the service program, the court found no evidence, however, that students ever were required to espouse any particular values when they worked with the volunteer programs, nor were they required to speak or write about the value of community service itself. For the court, then, the program was much like drug education or a civics class. Values were implicit, but the graduation requirement itself did not to compel the plaintiffs to accept or espouse those values. In addition to denying the First Amendment free expression claim, the Third Circuit refused to find that the program represented involuntary servitude in violation of the Thirteenth Amendment.

Appearance codes occasioned litigation in 1993, with three of the cases originating in Texas where regulations requiring hair on male students to fall no lower than the top of the collar are still being vigorously enforced. Two interesting constitutional challenges were mounted. In the first, a long-hair rule as it applied to American Indians was considered by a federal court.[61] The plaintiffs challenged the rule on the basis that their rights to expression and religion both were violated. After a lengthy and mostly inconclusive discussion of the relationship between hair length and the religious and social beliefs of the tribes involved in the litigation, the court held that long hair is "rife with symbolic meaning" and that the school rule failed the strict scrutiny test as it applied to Native-American students. The court also held that the suspension of students in excess of thirty days without any hearing opportunity violated the terms of *Goss v. Lopez*,[62] which mandates informal hearings for suspensions of fewer than ten days duration and significantly more due process for longer periods. In addressing the immunity claim advanced by the district in response to the plaintiffs' damage request, the court held that the school system did not knowingly violate the students' constitutional rights. Attorney fees, however, were awarded to the plaintiffs.

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[60] Steirer v. Bethlehem Area Sch. Dist., 789 F. Supp. 1337 (E.D. Pa. 1992), *aff'd*, 987 F.2d 989 (3d Cir. 1993).

[61] Alabama and Coushatta Tribes of Tex. v. Trustees of Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319 (E.D. Tex. 1993).

[62] Goss v. Lopez, 419 U.S. 565 (1975).

In the second Texas case, a third-grade student was confined to a small room without any contact with other students because he refused to cut a thin ponytail that went below the collar of his shirt. His mother filed suit alleging that the hair rule represented gender discrimination. In response, the school district argued that it had a compelling reason for the rule—its need to instill discipline and teach respect for authority. A lower court found for the district, but an appeals court held that the lower court should not have rejected the gender discrimination issue without a full hearing.[63] The court also found that the district had not proved that its lengthy in-school suspension did not place an unreasonable burden on the student.

An eighteen-year-old Texas high school student sought to have his school's hair requirement declared void as it applied to students who had reached the age of majority. Successful in a lower court, he was rebuffed on appeal, with the appeals court stating only that courts should not interfere in the enforcement of dress codes.[64]

Courts have found that schools may prevent students from wearing clothing or other indicia of membership in gangs. What happens, however, when schools fail to understand which clothing is symbolic of gang membership was addressed by a California district court.[65] The district banned all clothing containing the insignia of college or professional sports teams, applying the rule to all elementary and secondary schools. Testimony taken from students, however, indicated that gang members currently were wearing Pendleton shirts, white tee-shirts, baggy pants, and Nike shoes, none of which were covered by the school's clothing ban. There also was testimony offered that there were no gang activities at the elementary school level. For the court, the evidence suggested that the school system had failed to show a rational relationship between the rule and the school's need to maintain order. The sportswear ban was held to violate the students' free expression rights.

A New Jersey court considered a case in which a junior high school student's movie reviews were removed by a principal from the student newspaper before publication.[66] The content of the reviews was not at issue. Instead, their removal was undertaken because the movies in question were R-rated, requiring a child under the age of seventeen to be accompanied by a parent at the movie. The school newspaper was an after-school activity for students paid for by the school system.

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[63] Toungate v. Bastrop Indep. Sch. Dist., 842 S.W.2d 823 (Tex. Ct. App. 1992).

[64] Colorado Indep. Sch. Dist. v. Barber, 864 S.W.2d 806 (Tex. Ct. App. 1993).

[65] Jeglin v. San Jacinto Unified Sch. Dist., 827 F. Supp. 1459 (C.D. Cal. 1993).

[66] Desilets *ex rel.* Desilets v. Clearview Regional Bd. of Educ., 630 A.2d 333 (N.J. Super. Ct. App. Div. 1993).

School newspaper censorship cases rely on the Supreme Court's holdings in *Hazelwood v. Kuhlmeier*,[67] which involved a principal's decision to remove stories related to divorce and students' sexual behavior from a school-sponsored newspaper that was a part of the school curriculum. A lower court had decided the New Jersey case without relying on *Hazelwood*, however, holding instead that New Jersey's freedom of expression standard was more expansive than the Federal Constitution. Finding for the student, the lower court proposed a remedy that would allow the plaintiff to write in the newspaper about the lawsuit, since the movie reviews now were untimely. The appeals court upheld the lower court decision, but also concluded that *Hazelwood* compelled the same outcome. Finding that the reviews did not violate anyone's rights and were not vulgar, obscene, or poorly written, the appeals court concluded that there was no valid educational purpose associated with their removal. A principal concerned that parents would think the school was endorsing R-rated movies could merely attach a disclaimer to the review.

Sanctions for Student Misconduct

The process used to suspend or expel a student is most often the issue in misconduct cases, with *Goss* providing the legal point of departure for the analysis used by courts to weigh students' due process claims. Cases decided in 1993 involving procedural due process and exclusionary discipline are discussed in the section that follows. At the outset, cases raising more significant issues will be considered.

The District of Columbia Court of Appeals reviewed a case involving a challenge to a school administrator filed when he ignored a school district hearing officer's order that a student be readmitted to school.[68] The case involved a student who was arrested for the rape of another student that allegedly occurred in the victim's home. While the hearing officer ordered the student readmitted pending the outcome of the felony case, the principal refused, stating that he was concerned about the safety of the victim and of the accused. The accused subsequently was transferred to another school and the charges ultimately were dropped. A lawsuit against the principal followed, with the plaintiff claiming damages from the principal for refusing to readmit him while the charges were pending.

A lower court refused to find that the principal had qualified immunity for any of his actions and he appealed. The appeals court reversed, finding that the principal's refusal to readmit the student before the hearing by the examiner was not so substantial as to support a procedural due process damage claim. Evidence in the record supported the principal's claim that the student and his mother had agreed to home instruction, though they later argued that they had not. The court also held, however, that the principal was not immune from suit on the question of ignoring the examiner's decision. The case was remanded for a hearing on that point.

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[67] Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988).
[68] Durso v. Taylor, 624 A.2d 449 (D.C. 1993).

An Illinois school district's anti-loitering rule was challenged as being unconstitutionally vague by students who were suspended for three days after they stopped to converse in a prohibited area.[69] The rule had been instituted by the school in response to complaints from neighbors of the school about crowds of students near their homes. A letter was sent to all parents indicating the off-limits area and specifying the penalty. The plaintiffs alleged that the rule denied students the right to assembly and was unconstitutionally vague. The district court disagreed, holding that adequate notice and due process had been given, that the term "loitering" was clear, and that the ban was within the power of the school system to establish.

An Indiana federal district court considered a substantive due process claim filed by a student whose grades were reduced by one-fifth for a whole semester when she and her friends stopped home and consumed beer on their way to an off-campus class.[70] Courts generally are reluctant to interfere with school-rule penalty structures, following the Supreme Court's admonishment in another school drinking case not to interfere with the general discretion given to school systems to address discipline problems.[71] Nevertheless, the district court found that the grade deduction for a nonacademic offense was disproportionately severe and that there was no rational relationship between the rule and the penalty.

In another substantive due process case, a student suspended for five days for consuming alcohol challenged the school rule that permitted a reduction of the suspension period if the student participated in an alcohol treatment program. A district court held that the rule did not violate substantive due process because it was rationally related to the school's interest in protecting minors from the dangers of alcohol.[72] The court also refused to find that the grouping of alcohol with drugs in the school rule book unreasonably stigmatized students.

The possibility that students under the age of sixteen who have been expelled from school should be provided with home instruction was considered in a Massachusetts case.[73] At issue was the power of the state board to compel a local school committee to provide the instruction. While observing that a number of Massachusetts communities had, in fact, chosen to provide instruction for young students they expelled, the court concluded that nothing mandated the service. Furthermore, the court held that the legislature had never given the state board the power to oversee school discipline. Therefore, the board had exceeded its powers in issuing its order.

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[69] Wiemerslage v. Maine Township High Sch. Dist. 207, 824 F. Supp 136 (N.D. Ill. 1993).

[70] Smith v. School City of Hobart, 811 F. Supp. 391 (N.D. Ind. 1993).

[71] Wood v. Strickland, 420 U.S. 308 (1975).

[72] Kubany v. School Bd. of Pinellas County, 818 F. Supp. 1504 (M.D. Fla. 1993).

Suspensions and Expulsions

The adequacy of the procedures used in suspending or expelling students was raised in a number of cases. Students succeeded in challenging their punishments in three cases. A Colorado court considered an appeal filed on behalf of two students who admitted to drinking alcohol before attending a school dance.[74] The students had been suspended and transferred to another school. The school rule under which they were punished, however, refers to alcohol consumption out of school that causes the student to "be affected by" the drinking when they are in school. The court held that under a clear reading of the rule, consumption at home that did not affect behavior was not prohibited.

An Ohio court considered a variety of issues raised by students who were suspended for receiving school items from student cafeteria workers without paying for them.[75] While finding that there were adequate due process and evidence for the suspensions, the court nevertheless vacated the suspensions because the board debated the issue in closed session in clear contradiction to state law requiring that the deliberations be in an open meeting.

An Illinois student who was expelled for having an ice pick in school challenged her one-semester expulsion by asserting that she was not carrying the item as a "weapon," in violation of school rules, but instead was intending to return it to a friend's home after school. An appeals court affirmed a lower court finding that the expulsion was "palpably against the manifest weight of the evidence" and overruled the expulsion, finding that the ten-day suspension served by the student was adequate for the offense.[76]

A student who admitted to driving the car from which an air rifle was fired at his school, resulting in broken windows, was expelled by a school board after a full hearing. In considering the penalty for the student, however, the board suddenly considered other vandalism for which the student was allegedly responsible, including damage at an assistant principal's home. Because the board had entered the penalty phase of its deliberations, there was no opportunity for the student's counsel to contest the other alleged acts. A lower court overturned the expulsion because of this error; but, an appeals court reversed, finding that the court should simply have remanded the case to the school board for reconsideration of the penalty without reference to the other alleged acts of vandalism.[77]

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[73] Board of Educ. v. School Comm. of Quincy, 612 N.E.2d 666 (Mass. 1993).

[74] Martinez v. School Dist. No. 60, 852 P.2d 1275 (Colo. Ct. App. 1992).

[75] Hardesty v. River View Local Sch. Dist. Bd. of Educ., 620 N.E.2d 272 (Ohio Ct. C.P. 1993).

[76] Washington v. Smith, 618 N.E.2d 561 (Ill. App. Ct. 1993).

Students were less successful in a variety of state court school exclusion cases. A student who was given a ten-day suspension and a course grade of "F" for helping to steal an algebra test from a teacher's file cabinet alleged that the penalty was unfair because students who cheated by using the test but who did not help steal it were not suspended. The court disagreed with this novel claim and upheld the additional penalty for the theft.[78] In a similar case, a Florida student, charged with distribution of drugs at school, was suspended only for possession of drugs. She sought to have her suspension overturned because the school board notice did not specify the possession offense. The court refused to find that the error was significant.[79]

A Texas school district expelled a student for carrying a firearm and drugs to school. The student's mother then filed a petition seeking a trial de novo before a local court on the charges. Both the lower court and an appeals court could find no statutory authority for courts to conduct de novo trials in school discipline cases.[80]

In a final case featuring both an unusual fact situation and an unusual ruling, a student was denied her high school diploma because she had more than six unexcused absences. She alleged that her school's attendance policy was unreasonable and that she should receive her diploma. Rather than ruling on the plaintiff's substantive issue, however, the court used the "clean hands doctrine" as justification for preventing the plaintiff from arguing about the relief she requested.[81] The plaintiff's action was dismissed because she had forged notes purporting to excuse her from school on the days when she was absent.

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[77] Yatron v. Hamburg Area Sch. Dist., 631 A.2d 758 (Pa. Commw. Ct. 1993).

[78] Reed v. Vermilion Local Sch. Dist., 614 N.E.2d 1101 (Ohio Ct. App. 1992).

[79] Student Alpha Id Number Guja v. School Bd. of Volusia County, 616 So. 2d 1011 (Fla. Dist. Ct. App. 1993).

[80] Sanchez v. Huntsville Indep. Sch. Dist., 844 S.W.2d 286 (Tex. Ct. App. 1992).

[81] Isbell v. Brighton Area Sch., 500 N.W.2d 748 (Mich. Ct. App. 1993).

Bilingual-bicultural Programs

Litigation continued in 1993 on the claims advanced by New York City litigants who asserted that the curriculum of their public schools discriminated against African Americans by distorting and demeaning their role in various aspects of world and American culture. A district court failed to find a cause of action upon which the plaintiffs could bring such a complaint, but allowed them additional time to develop their claims.[82] The plaintiffs returned to court suggesting that their rights under 42 U.S.C. sections 1981 and 1983 had been violated because New York City's curriculum contained materials required by the school system related to Italian and Jewish heritages but nothing related to African Americans. They further argued that title VI of the Civil Rights Act of 1964 gave them a right of action.

The district court rejected both arguments, concluding that there was no right of action under either.[83] The section 1983 claim required, the court concluded, a showing of discriminatory intent on the part of school defendants which could not be proved by showing that specialized curricular materials had been mandated to address the contributions of certain other groups. No evidence of discriminatory intent was advanced by the plaintiffs. Turning to the title VI claim, the court invited the parties to submit an administrative history of the regulations as well as briefing the court on litigation concerning its provisions. The court concluded that title VI regulations were aimed at the discriminatory impact of the tests and policies determining admission into school programs, but had never been intended to cover the disparate impact of a school's curriculum. Nothing in its history suggested otherwise and a statement from the United States Department of Education sent to the court explained that the federal government had never construed the act to cover such matters as gender or racial bias in the curriculum. The court therefore dismissed the plaintiff's suit for failing to state grounds on which relief could be granted.

Desegregation

The Supreme Court's 1992 decision in *Freeman v. Pitts*[84] clarified previously conflicting decisions in the circuit courts of appeal by holding that lower courts could relinquish their supervision of desegregation disputes in stages. *Freeman* also contained the admonishment that courts considering requests from school districts seeking a declaration that they had achieved unitary status would need to prove that changes in the racial composition of their schools were "not traceable, in a proximate way, to the prior violation."[85] In general, courts considering requests for unitary status apply the factors contained in *Green v. New Kent County School Board.*[86] *Green* requires that all traces of discrimination be removed in student assignments, faculty assignments, transportation, resource allocation, physical facilities, and extracurricular activities.

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[82] Grimes v. Cavazos, 786 F. Supp. 1184 (S.D.N.Y. 1992). *See* The Yearbook of Education Law 1993 at 75-6.

[83] Grimes *ex rel.* Grimes v. Sobol, 832 F. Supp 704 (S.D.N.Y. 1993).

[84] Freeman v. Pitts, 112 S. Ct. 1430 (1992).

Some desegregation cases in 1993 relied on *Freeman* in addressing claims seeking an end to court supervision. For the most part, however, the decisions made in 1993 raised few new legal issues and only one major school system, Oklahoma City, found itself freed from court supervision.

Cross-district Remedies

Litigation continued in the complicated case involving desegregation in Kansas City, Missouri, with the Eighth Circuit's attention focusing on two appeals related to the question of which political entities were required to pay the costs for desegregation. A third case suggested that the parties were far apart on many basic issues related to the interdistrict plan. In the first of the two finance cases the Eighth Circuit dismissed an appeal filed by taxpayers who contested a district court decision raising property taxes to pay for teacher salary increases.[87] The appeal was dismissed because the plaintiffs were not parties to the case and never filed to become parties, thereby lacking standing to appeal.

In the second finance case, the state defendants took up the taxpayer appeal regarding the salary increases and further argued that the district had attained unitary status under *Freeman*. The Eighth Circuit rejected both claims, holding that the plan for magnet schools and other desegregation tools would be "stillborn" if the state did not pay its share. Relying on a number of district court decisions, including an order made after the appeal was filed, the appeals court also found that the district court was "anticipating an orderly and gradual withdrawal of court control" as contemplated by *Freeman*.[88] Looking at the *Green* factors, the court noted that further evidence would need to be collected and that the district court had concluded correctly that merely starting a successful desegregation program was not all that was required under *Freeman*.

Black students brought suit because they were denied admission to suburban schools in a third case from Kansas City considered by the

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[85] *Id.* at 1447.

[86] Green v. County Sch. Bd. of New Kent County, Va., 391 U.S. 430 (1968).

[87] Jenkins v. Missouri, 967 F.2d 1248 (8th Cir. 1992).

[88] Jenkins v. Missouri, 11 F.3d 755, 761 (8th Cir. 1993).

Eighth Circuit.[89] The case addressed the interdistrict plan developed by the city, state, and suburban district participants in the case. The parties indicated by their motions concerning transportation times, attorney fees, capital construction costs, and other issues that they were far from reaching agreement. The appeals court directed the district court to draft a plan seeking a resolution of all outstanding issues, urging that this be done with speed since more than seven years already had been spent on the effort.

Finance issues also were disputed in the St. Louis desegregation case, with the district court holding that a suburban school district could not seek reimbursement from the state for the capital costs associated with improving an elementary school.[90] While finding "some logic" in the district's request, because the school to be improved would accommodate some transfer students under a voluntary magnet plan, the court concluded that county districts could not recover capital costs.

Capital improvements of a much larger magnitude were considered by the Eighth Circuit, which reviewed a decision by the district court that the state was not liable for the increased cost of improving St. Louis schools. The district conceded that it had $355 million available for the construction and that no further funds were needed, but asked for a larger state contribution because delays in starting the project had forced costs to increase. The Eighth Circuit disagreed, holding that there was no basis for increasing the state's share for a cost increase that was due to the district's delay.[91] The appeals court also approved a change in racial balance percentages for the nonmagnet schools in St. Louis that had been approved by the district court.

A New York district court responded to a claim by the Yonkers school board and civil rights groups asserting that state funds were required to eliminate desegregation in Yonkers.[92] The most recent decision in the *Yonkers* case attempted to answer the question of whether the last vestiges of segregation had been removed in the city. The court deferred the interesting question of who was liable for paying for additional desegregation until a later time. Also deferring the question of what has caused a continuation of "discriminatory conditions" in Yonkers, the court concluded only that such conditions did, in fact, exist by looking at disparate majority and minority test scores. Test scores or other outcome measures are seldom cited in desegregation cases and are not contemplated by *Green* as a factor to be considered in determining if a district has reached desegregated status. The court nevertheless went

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[89] Jenkins *ex rel.* Agyei v. State of Mo., 981 F.2d 1009 (8th Cir. 1992).

[90] Liddell v. Board of Educ. of St. Louis, Mo., 814 F. Supp. 788 (E.D. Mo. 1993). *See also* 795 F. Supp. 930 (E.D. Mo. 1992).

[91] Liddell v. Board of Educ. of St. Louis, 988 F.2d 844 (8th Cir. 1993).

[92] United States v. City of Yonkers, 833 F. Supp 214 (S.D.N.Y. 1993).

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on to conclude that achievement would be improved if better facilities and additional equipment, such as computers, were supplied to the schools. The court scheduled the finance question for a later trial.

Desegregation Plan Oversight

The lengthy desegregation litigation involving Oklahoma City came to an end in 1993. Two years earlier, the Supreme Court held in *Board of Education of Oklahoma City v. Dowell*[93] that good faith compliance with desegregation orders should be a factor in deciding if a district should be removed from court supervision. Holding that court supervision was not intended to extend indefinitely, the Court remanded the case for disposition. On remand, the district court again affirmed its finding that the district had achieved unitary status.[94] The case once more was appealed to the Tenth Circuit.

While finding that school segregation still existed, the Tenth Circuit could not conclude that the school board was responsible in a "proximate way" for the segregation. Finding that the vestiges of segregation attributable to early school board actions had been eliminated, the appeals court affirmed a host of lower court findings as "not clearly in error" and upheld the district court decision.[95] While *Freeman* required the district court to examine whether the school board had shown good faith by planning actions to ensure desegregation success in the future, the appeals court found that the lower court had relied largely on the board's assurances that this would occur. This and other parts of the appeals court's opinion suggested that it reached its decision reluctantly.

Other desegregation monitoring cases showed little sign that litigation was nearing completion. Plaintiffs in Talladega County, Alabama were unsuccessful in reopening a case after a district had been declared to have reached unitary status in 1985.[96] Nevertheless, the litigation continued with plaintiffs challenging the school board's actions since 1985. The reopening of the case required the plaintiffs to show that the school board had acted with discriminatory intent when it made decisions regarding a school site decision, an interdistrict transfer policy, and the reassignment of students following a school closing. The district court found no such intent and the Eleventh Circuit affirmed.[97] Other issues in the case remain to be settled, however.

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[93] Board of Educ. of Okla. City Pub. Sch., Indep. Sch. Dist. No. 89 v. Dowell, 498 U.S. 237 (1991).

[94] Dowell v. Board of Educ. of Okla. City Pub. Schs., 778 F. Supp 1144 (W.D. Okla. 1991). See THE YEARBOOK OF EDUCATION LAW 1993 at 79-80.

[95] Dowell v. Board of Educ. of Okla. City Pub. Schs., Indep Sch. Dist. No. 89, 8 F.3d 1501 (10th Cir. 1993).

[96] Lee v. Talledega County Bd. of Educ., 963 F.2d 1426 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1257 (1993).

Plaintiffs in Tucson argued successfully that the closing of a high school would have a disproportionate impact on minority students.[98] The school designated for closure was the most racially balanced of all Tucson high schools and the proposed new school boundaries would have created four predominately minority schools and five predominately Anglo schools. The court concluded that the action would violate the terms of a 1978 settlement agreement ending a previous lawsuit.

An unhappy Eleventh Circuit reviewed an unpublished order affirming a school board's plan to modify attendance zones in Polk County, Florida, reversing the district court and suggesting that the district court judge may have violated the code of judicial conduct.[99] The disputed elementary district attendance plan would have created three "white" schools, while leading to overcrowding in those schools and the underutilization of schools with large minority populations, all in an apparent attempt to avoid desegregation. Attempts by the school board to show that small percentages of minority students in the mostly white schools represented desegregation found no support from the appeals court, which also characterized the school board as having misread *Freeman*. The board had argued that the burden was on the plaintiffs to demonstrate why the district had not reached unitary status.

The district court in the Florida case was chastised by the Eleventh Circuit, both for failing to write any reviewable opinion regarding its acceptance of the plan, and also for its "apparent reliance" on ex parte communications in reaching its decision. In its final brief order, the court had referred to the "plight" of students living in certain sections of the school district if the board's plan was not adopted. The appeals court reminded the court that the canons of judicial ethics required such communications to be presented in court so that they could be contested. On remand, the lower court was ordered to direct the school system to put in place an intradistrict transfer plan that had previously been agreed to by the parties.

The Fifth Circuit, monitoring desegregation in a Mississippi County, voted to permit a county board to close a popular racially mixed elementary and junior high school.[100] The county schools had been under desegregation orders since 1969, during which time the white percentage of students enrolled in the district had dwindled to barely 10%. The school in question, however, was fully integrated and had the best student achievement scores in the district. Plaintiffs argued that were the school to be closed, white students would leave the public school system altogether. This argument failed to convince a divided appeals court, however, with the majority concluding that the closing, which was made to save money, should be approved. The dissenting justice argued that the closing violated *Swann v. Charlotte-Mecklenburg Board of Educa-tion*[101] because the decision would create one-race schools in the community.

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[97] Elston v. Talledega County Bd. of Educ., 997 F.2d 1394 (11th Cir. 1993).

[98] Fisher v. Lohr, 821 F. Supp. 1342 (D. Ariz. 1993).

[99] Mills *ex rel.* Mills v. Polk County Bd. of Pub. Instuction, 993 F.2d 1485 (11th Cir. 1993) (withdrawn from publication).

[100] Hull v. Quitman County Bd. of Educ., 1 F.3d 1450 (5th Cir. 1993).

State Court Cases

The New Jersey Supreme Court reviewed an appeals court decision regarding a "sending-receiving" relationship that had been established by three school districts. Such agreements are entered into by districts that do not operate high schools. Decisions to terminate such agreements are reviewable by the state board after consideration by the commissioner. One of the grounds used in the review was the impact on school desegregation if the relationship were to be terminated. The use of race as a factor in the state's decision was challenged by one of the communities seeking to terminate. A state appeals court rejected the challenge to the use of the racial factor, concluding that it was appropriate for consideration along with other factors contained in the review statute. This decision was affirmed by the state's highest court, which held that the state board had broad powers to study a variety of factors.[102]

Attorney Fees

Most attorney fee issues are settled by courts when a decision in a case is rendered; such settlements are reported throughout this chapter. Occasionally, however, a desegregation case involves fee issues of such complexity that the question is separately litigated. This transpired in a Florida case involving fees for activities some of which occurred more than two decades earlier.[103] As required by the Civil Rights Attorneys' Fees Awards Act of 1976,[104] the prevailing plaintiffs filed notice of their fee request within thirty days of the final consent decree issued by the district court to close the case. Both parties then agreed to attempt an informal resolution of the fee question, but to no avail.

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[101] Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971).

[102] Board of Educ. of Englewood Cliffs v. Englewood Bd. of Educ., 608 A.2d 914 (N.J. Super. Ct. App. Div. 1992), *aff'd*, 625 A.2d 483 (N.J. 1993).

[103] Mannings v. School Bd. of Hillsborough County, Fla., 826 F. Supp 1404 (M.D. Fla 1993).

[104] 42 U.S.C. § 1988.

The prevailing legal defense fund attorneys proposed a lodestar computation using an hourly rate of $350 dating from the start of the litigation, for a total of more than $1.3 million. They also proposed fees for work done prior to the court's first order in the case issued in 1971. The defendants objected, arguing that the plaintiffs' calculation was not sufficiently itemized, that it was filed too late to be considered, and that fees for attorneys now deceased could not be included. The distance between the two parties caused the court to scold both sides, cautioning them that "another round of litigation" in the case on the fee question would not be welcomed by the court.

In helping to clarify the issues, the court first asked the plaintiffs to respond why they delayed in filing for the fees for so long. Their claim as prevailing parties for work before the 1971 order in the case could have been filed after the Attorney Fees Act was passed in 1976. Furthermore, because of the delay, which seemed to be the plaintiffs' fault, the court indicated that it would not accept present-value rates for the work performed before 1971. In addition, the court requested better time and activity reports outlining which attorney performed which tasks throughout the litigation. As to the claim that death cancelled the bill, the court also held that the fees for deceased attorneys still must be paid. Finally, the court set a tight timetable in an attempt to resolve the issue.

4

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Introduction

Litigation over the rights of students and employees with disabilities continued at a significant pace in 1993 as it has for the past several years. As in prior years much of the litigation involved procedural issues and contested placement decisions under the Individuals with Disabilities Education Act (IDEA).[1] A large number of cases dealt with procedural issues governing the conduct of due process hearings and court trials. Numerous cases also involved the appropriate educational placement for students with disabilities with IDEA's least restrictive environment provision figuring prominently in many decisions.

Two important cases were decided by the United States Supreme Court during 1993. In the first, *Zobrest v. Catalina Foothills School District*,[2] the High Court held that the provision of a sign-language interpreter to a hearing-impaired student attending a parochial school did not violate the establishment clause of the First Amendment. In *Florence County School District Four v. Carter*,[3] the Court held that parents could be reimbursed for expenses related to a unilateral private school placement even if the placement was made in an unapproved facility.

Litigation concerning the rights of employees with disabilities in programs receiving federal funds also continued at a significant level under section 504 of the Rehabilitation Act.[4] In many of these cases employees or applicants for employment tried to show that they were otherwise qualified for particular positions and could perform the essential duties of the positions if provided with reasonable accommodations. For the second year cases have been reported that were decided under the Americans with Disabilities Act.[5]

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[1] 20 U.S.C. § 1400 *et seq.* as amended by 104 Stat. 1103 (1990).

[2] 113 S. Ct. 2462 (1993). *See* THE YEARBOOK OF EDUCATION LAW 1993 at 84-85.

[3] 114 S. Ct. 361 (1993). *See* THE YEARBOOK OF EDUCATION LAW 1993 at 95-96, 101.

Entitlement to Services

The IDEA requires school districts to provide students with disabilities with a free appropriate public education (FAPE), consisting of any needed special education and related services.[6] However, it does not establish any substantive standards by which those services can be judged to be adequate. The IDEA simply provides that the student is to be afforded specially designed instruction[7] in conformance with the student's Individualized Education Program (IEP).[8] The Supreme Court has held that a student with disabilities is entitled to personalized instruction with support services sufficient to permit the student to benefit from the education provided.[9] The lower courts have been cautioned not to impose their views of preferable educational methods on school districts;[10] however, frequently they are asked to determine what level of services is required to meet IDEA's minimum standards. Students attending private schools also are entitled to the benefits of IDEA.[11]

Although the Supreme Court held in *Zobrest v. Catalina Foothills School District*[12] that the provision of a sign-language interpreter to a parochial school student was not unconstitutional, it did not rule that the student was entitled to receive such services under IDEA. In reversing the Ninth Circuit Court of Appeals decision,[13] the High Court found that the services of the sign-language interpreter were part of a general government program that distributed benefits neutrally to any child qualifying as disabled under IDEA, without regard to the nature of the school the child attended. The Court held that the interpreter would be present in a parochial school only as the result of private decision-making on the part of parents and that there was no financial incentive for parents to choose a parochial school. The Court further determined that the services of a sign-language interpreter could be distinguished from those of a teacher or guidance counselor in that the interpreter would not add or subtract from the pervasively sectarian environment in which the student had been placed.

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[4] 29 U.S.C. § 794.

[5] 42 U.S.C. §§ 12101 - 12213.

[6] 20 U.S.C. § 1401(18).

[7] 20 U.S.C. § 1401(16).

[8] 20 U.S.C. § 1401(18)(d).

[9] Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982).

[10] *Id.*

[11] 34 C.F.R. § 300.452.

[12] 113 S. Ct. 2462 (1993).

[13] 963 F.2d 1190 (9th Cir. 1992); see THE YEARBOOK OF EDUCATION LAW 1993 at 84-85.

A district court in Missouri held that a student who attended a parochial school but received special education services at a public school was entitled to be transported between the two sites.[14] The court found that the transportation was a required related service and that its provision would not violate the establishment clause. However, the Supreme Judicial Court of Maine held that a public school district could not provide counseling and other therapy services on the premises of a parochial school.[15] An administrative hearing officer had found that state regulations required that special education services be provided only at a public school or a religiously neutral site. The state courts held that the purpose of the regulation in question was to avoid a conflict with the establishment clause.

The district court in the District of Columbia held that a student who had been diagnosed as having an Attention Deficit Hyperactivity Disorder was not eligible for special education services since his superior academic performance indicated that his educational performance had not been adversely affected by the disorder.[16] The Court of Appeals of Indiana held that students with disabilities over the age of eighteen are entitled to receive special education services since nondisabled students over the age of eighteen receive educational services.[17] A federal district court in Illinois held that IDEA's entitlements apply to pretrial detainees of school age in a county jail.[18]

Procedural Safeguards

The IDEA contains an elaborate system of due process safeguards to ensure that students with disabilities are properly identified, evaluated, and placed according to the Act's mandates.[19] The regulations promulgated under the Act state that the parents or guardian of a child with disabilities must be provided with the opportunity to participate in the development of the IEP for their child.[20] Implementing regulations also require school districts to obtain parental consent prior to evaluating the child or to making an initial placement.[21] Once a student has been placed in special education, the school district must provide the parents with proper notice before initiating a change in placement.[22] Once placed a student's situation must be reviewed at least annually[23] and the student must be reevaluated at least every three years.[24]

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[14] Felter v. Cape Girardeau Sch. Dist., 810 F. Supp. 1062 (E.D. Mo. 1993).

[15] Wright v. Saco Sch. Dep't, 610 A.2d 257 (Me. 1992).

[16] Lyons *ex rel.* Anderson v. Smith, 829 F. Supp. 414 (D.D.C. 1993).

[17] Evans v. Tuttle, 613 N.E.2d 854 (Ind. Ct. App. 1993).

[18] Donnell C. v. Illinois State Bd. of Educ., 829 F. Supp. 1016 (N.D. Ill. 1993), *citing* 34 C.F.R. § 300.2(b)(4).

[19] 20 U.S.C. § 1415.

[20] 34 C.F.R. § 300.345.

The IDEA stipulates that an IEP must contain statements of the student's current educational performance, annual goals, short term objectives, the specific educational services to be provided, the extent to which the child can participate in general education, the date of initiation and duration of services, and evaluation criteria to determine if the objectives are being met.[25]

If the parents disagree with any of the school district's decisions regarding a proposed IEP or any aspect of a FAPE, they may request an impartial due process hearing.[26] Any party not satisfied with the final decision of the administrative proceedings may appeal to the state or federal courts;[27] however, all administrative remedies must be exhausted prior to resort to the courts unless it is futile to do so. While an administrative or judicial action is pending, the school district may not change the student's placement without parental consent[28] or a court order.[29]

The IDEA empowers the courts to review the record of the administrative proceedings, hear additional evidence, and "grant such relief as the court determines is appropriate" based on the preponderance of evidence standard.[30] However, judges have been cautioned not to substitute their views of proper educational methodology for that of competent school authorities.[31] The IDEA does not contain a statute of limitations for filing a lawsuit; therefore courts must borrow one from analogous state statutes.

Evaluation

A district court in Texas held that a school district could not insist on conducting a required three-year reevaluation of a student when subject-

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[21] 34 C.F.R. § 300.504(b).
[22] 20 U.S.C. § 1415(b)(1)(C).
[23] 34 C.F.R. § 300.343(d).
[24] 34 C.F.R. § 300.534(b).
[25] 20 U.S.C. § 1401(20).
[26] 20 U.S.C. § 1415(b)(2).
[27] 20 U.S.C. § 1415(e)(2).
[28] 20 U.S.C. § 1415(e)(3).
[29] Honig v. Doe, 484 U.S. 305 (1988).
[30] 20 U.S.C. § 1415(e)(2)(C).
[31] Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982).

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ing the student to the reevaluation could cause the student harm.[32] The student's physician determined that his level of anxiety reached panic proportions whenever he was subjected to forced interpersonal interaction. The parents had obtained several third-party evaluations, but the school district found that each did not meet state criteria. Since the parents would not allow the school district to reevaluate the student, officials determined that he was no longer eligible for special education.

Development of Individualized Education Programs

The Third Circuit Court of Appeals upheld a district court's finding that a school district did not violate the IDEA by making modifications to a student's IEP even though it did not follow normal procedures in doing so since the modifications had been made in the spirit of compromise following discussions over a rejected IEP.[33] The court also held that presenting a draft IEP at the IEP meeting did not violate the IDEA. A district court in Virginia also held that draft IEPs do not violate the IDEA as long as the parents have input into the process.[34]

The First Circuit Court of Appeals held that a school district was not required to review and revise a student's IEP after he had been unilaterally enrolled in a private school by his parents.[35] The court held that the parents' unilateral action relieved the school district of the obligation to review the IEP.

A district court in Connecticut held that there is no provision in the IDEA requiring school officials to accept the recommendations of an independent evaluation or accord it any particular weight.[36] The court held that school officials met the IDEA's requirement that an independent evaluation be considered when the school psychologist read and summarized the evaluation report at the IEP meeting.

School districts may be required to develop IEPs over the summer months so that an IEP is in place at the start of the school year according to a ruling by a district court in Alabama. The court invalidated an interim IEP the school district had developed to cover the first few weeks of school while officials prepared a permanent IEP.[37]

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[32] Andress v. Cleveland I.S.D., 832 F. Supp. 1086 (E.D. Tex. 1993).

[33] Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031 (3d Cir. 1993).

[34] Doyle v. Arlington County Sch. Bd., 806 F. Supp. 1253 (E.D. Va. 1992), *on rem'd from* 953 F.2d 100 (4th Cir. 1991). *See* THE YEARBOOK OF EDUCATION LAW 1993 at 91.

[35] Amann v. Stow Sch. Sys., 982 F.2d 644 (1st Cir. 1992).

[36] T.S. v. Ridgefield Bd. of Educ., 808 F. Supp. 926 (D. Conn. 1992).

[37] Myles S. v. Montgomery County Bd. of Educ., 824 F. Supp. 1549 (M.D. Ala. 1993).

Change in Placement

A district court in Tennessee held that a change in schools, brought about by implementation of a desegregation plan, was not a change in placement as defined by the IDEA.[38] The court held that a change in the school where a student receives education is not necessarily a change in placement for purposes of the IDEA's due process requirements.

Administrative Hearings

The courts dismissed several lawsuits because the plaintiffs failed to exhaust all administrative remedies prior to resorting to court action. One of the purposes of the exhaustion requirement, according to a Pennsylvania District Court, is to afford the state the opportunity to render expert fact-finding.[39] The Tenth Circuit Court of Appeals, in a class action lawsuit, held that a challenge to state policies and practices was precisely the type of issue the IDEA's administrative process was designed to address.[40] The court stated that purposes of exhaustion would be furthered by giving the state the opportunity to consider and correct the alleged violations. However, the court indicated that not every member of the class was required to exhaust the IDEA's administrative remedies, but that a few representative claims would be sufficient to secure statutory compliance. A district court in Indiana, however, held that class action due process hearings were not permitted and therefore plaintiffs in such an action were not required to exhaust administrative remedies.[41]

A district court in Connecticut concluded that a parent may not raise an issue at the court level that was not raised at the administrative level.[42] The court held that a parent's failure to pursue the issue of the appropriateness of the student's IEP during due process hearings barred adjudication at the court level.

Exhaustion would be futile if a hearing officer lacked the authority to provide the relief sought. An Indiana district court held that parents who were contesting the state's procedures for approving residential placements were not required to exhaust administrative remedies since the hearing officer did not have the authority to determine that the process was illegal or to provide an appropriate remedy.[43]

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38. Middlebrook v. School Dist. of the County of Knox, Tenn., 805 F. Supp. 534 (E.D. Tenn. 1991).
39. Stauffer *ex rel.* De Marco v. William Penn Sch. Dist., 829 F. Supp. 742 (E.D. Pa. 1993).
40. Association for Community Living in Colo. v. Romer, 992 F.2d 1040 (10th Cir. 1993).
41. Evans v. Evans, 818 F. Supp. 1215 (N.D. Ind. 1993).
42. T.S. v. Ridgefield Bd. of Educ., 808 F. Supp. 926 (D. Conn. 1992).
43. Bray *ex rel.* Bray v. Hobart City Sch. Corp., 818 F. Supp. 1226 (N.D. Ind. 1993).

A district court in Delaware held that a hearing panel's action, whereby it decided that a student was entitled to a private school placement but referred the matter for further evaluation of private school options, did not comport with the IDEA's finality requirement.[44] The court found that such action undermined the IDEA's compelling concern for prompt resolution of placement decisions. The finality requirement also was an issue in a decision of an Indiana district court that the state's residential placement application process was not consistent with the Act.[45] The court held that the approval process allowed the state to circumvent the Act's due process procedures by permitting the state to review a hearing officer's decision even if no appeal had been filed. The court found that this added another step in the process and could delay implementation of an IEP.

A state court in New Jersey held that an administrative law judge did not have the authority to order a state agency to pay costs associated with a special education placement since the agency did not receive funds under the IDEA and was not charged with assuring children with disabilities a FAPE.[46] A district court in Michigan held that an attorney who normally represented school districts was not automatically biased and was not precluded from serving as a hearing officer.[47] The attorney in question had no prior relationship with the school district involved in the hearing.

A district court in Texas held that when parents request an extension during a due process hearing, this does not waive their right to receive a decision within forty-five days.[48] However, the court held that the forty-five day period should be tolled for the time of the extension.

Court Proceedings

The Fifth Circuit Court of Appeals stated that while a district court should give due weight to a hearing officer's findings, those findings are not conclusive and the court may hear additional evidence and reach an independent conclusion based on the preponderance of the evidence.[49] The court held that the IDEA does not require a court to defer to the hearing officer's findings when its own review of the evidence suggests that the administrative decision was erroneous. Similarly, the district court in New Jersey held that a hearing decision can be set aside only if a preponderance of the evidence indicates that it was erroneous.[50] The Ninth Circuit Court of Appeals also held that a district court has the discretion to admit additional evidence concerning relevant events that occurred subsequent to the administrative hearings.[51]

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[44] Slack v. State of Del. Dep't of Pub. Instruction, 826 F. Supp. 115 (D. Del. 1993).

[45] Bray *ex rel.* Bray v. Hobart City Sch. Corp., 818 F. Supp. 1226 (N.D. Ind. 1993).

[46] L.P. v. Edison Bd. of Educ., 626 A.2d 473 (N.J. Super. Ct. 1993).

[47] Leon v. State of Mich. Bd. of Educ., 807 F. Supp. 1278 (E.D. Mich. 1992).

[48] Andress v. Cleveland I.S.D., 832 F. Supp. 1086 (E.D. Tex. 1993); *citing* 34 C.F.R. § 300.512(a)(1).

[49] Teague Indep. Sch. Dist. v. Todd. L., 999 F.2d 127 (5th Cir. 1993).

The First Circuit Court of Appeals stated that a trial court judging the adequacy of an IEP has not committed legal error as long as it has not overlooked or misconstrued evidence and its overall decision is based on a supportable finding that the IEP is reasonably calculated to address the student's needs, both academic and nonacademic.[52] A district court in Virginia, on remand from the Fourth Circuit, held that in determining the relative weight to be accorded to the testimony of witnesses, it considered the fact that all of the parents' witnesses had records of testifying against school systems.[53] A district court in New Jersey stated that the IDEA did not give the court the power to vacate an administrative hearing decision solely on the basis of the parents' request to show cause.[54]

The Third Circuit Court of Appeals held that events that occur after placement decisions have been made may be relevant to the court's inquiry regarding the appropriateness of a proposed IEP, but cannot be substituted for the threshold determination of whether the proposed IEP was reasonably calculated to confer educational benefit at the time it was offered.[55] In a concurring opinion, one judge elaborated that the test of appropriateness of an IEP is prospective: it must be judged according to whether it was appropriate at the time it was created based on the evidence available at that time. Stating that school district decisions cannot be judged exclusively in hindsight, that judge noted that it is difficult to ascertain whether subsequent student gains resulted from an educational program or other factors.

A Louisiana district court held that the party challenging a placement bears the burden of showing why the educational setting recommended by the IEP is not appropriate;[56] however, the New Jersey district court held that the party challenging the outcome of the administrative proceedings bears the burden of proof.[57] The Third Circuit Court of

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[50] Remis *ex rel.* Trude v. New Jersey Dep't of Human Servs., 815 F. Supp. 141 (D.N.J. 1993).

[51] Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467 (9th Cir. 1993).

[52] Lenn v. Portland Sch. Comm., 998 F.2d 1083 (1st Cir. 1993).

[53] Doyle v. Arlington County Sch. Bd., 806 F. Supp. 1253 (E.D. Va. 1992), *on rem'd from* 953 F.2d 100 (4th Cir. 1991); *see* THE YEARBOOK OF EDUCATION LAW 1993 at 91.

[54] Woods v. New Jersey Dep't of Educ., 823 F. Supp. 254 (D.N.J. 1993).

[55] Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031 (3d Cir. 1993). *See also* Delaware County Intermediate Unit #25 v. Martin K., 831 F. Supp. 1206 (E.D. Pa. 1993).

[56] Swift v. Rapides Parish Pub. Sch. Sys., 812 F. Supp. 666 (W.D. La. 1993).

[57] Remis *ex rel.* Trude v. New Jersey Dep't of Human Servs., 815 F. Supp. 141 (D.N.J. 1993).

Appeals held that a school district bears the burden of proof, particularly when mainstreaming is an issue.[58] A district court in Pennsylvania, relying on the Third Circuit opinion, also held that the school district bears the burden of proof.[59] A district court in Maine found a lawsuit to be moot because one of the plaintiffs had been removed from the contested program and had been placed in a new program.[60]

Standing to Sue

A district court in Delaware held that although the parents of a student with disabilities had prevailed at the administrative level on the legal issues involved in a dispute, they had standing to sue.[61] The court found that they had not obtained the relief they had requested and thus were an aggrieved party.

Statute of Limitations

The First Circuit Court of Appeals affirmed a district court ruling that the correct statute of limitations for Massachusetts was the thirty-day limitations period for actions under the State Administrative Procedures Act.[62] The court emphasized that the short limitations period imposed by this statute was consistent with the IDEA's goal of a quick disposition of disputes regarding a student's educational placement.

The district court in New Hampshire also found that a thirty-day period for appeals of state administrative agency decisions was the most suitable statute of limitations to borrow for IDEA purposes.[63] The court further held that even though the parents filed their lawsuit prior to any court decisions adopting this limitations period, it could be applied retroactively and granted the school district's motion to reconsider its previous decisions in the case.[64] In a later decision that same court held that the thirty-day period was applicable even though the state legislature had enacted a new 120-day statute of limitations for appeals of administrative decisions pursuant to the IDEA since the lawsuit was

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58. Oberti v. Board of Educ. of the Borough of Clementon Sch. Dist., 995 F.2d 1204 (3d Cir. 1993), *aff'g* 801 F. Supp. 1392 (D.N.J. 1992); *see* THE YEARBOOK OF EDUCATION LAW 1993 at 91, 98, 110.
59. Delaware County Intermediate Unit #25 v. Martin K., 831 F. Supp. 1206 (E.D. Pa. 1993).
60. Robbins v. Maine Sch. Admin. Dist. No. 56, 807 F. Supp. 11 (D. Me. 1992).
61. Slack v. State of Del. Dep't of Pub. Instruction, 826 F. Supp. 115 (D. Del. 1993).
62. Amann v. Town of Stow, 991 F.2d 929 (1st Cir. 1993); *citing* MASS. GEN. L. ch. 30A § 14.
63. Valerie J. v. Derry Coop. Sch. Dist., 825 F. Supp. 434 (D.N.H. 1993).
64. Valerie J. v. Derry Coop. Sch. Dist., 771 F. Supp. 483 (D.N.H. 1991), 771 F. Supp. 492 (D.N.H. 1991); *see* THE YEARBOOK OF EDUCATION LAW 1992 at 97, 103-104.

filed before the new effective date.[65] However, the court held that the limitations period should be tolled because the hearing officer had failed to notify the parties of the allotted time in which to appeal.

A district court in Connecticut declared that the state's forty-five day statute of limitations period established by the Uniform Administrative Procedures Act was applicable in IDEA lawsuits since those actions resembled state administrative appeals.[66] This court also indicated that adoption of a brief limitations period comported with the IDEA's intent of promoting expeditious resolution of disputes. The court further held that the limitations period began on the day the final hearing decision was mailed.

A district court in New Jersey stated that a school district's appeal of an administrative decision that was filed seventy-one days after the decision was rendered was not time-barred.[67] The court noted that previous decisions in the Third Circuit applied either a two-year or six-year limitations period.

The district court in New Hampshire, in a case on remand from the First Circuit, held that the doctrine of laches was appropriate for determining the timeliness of the action, rather than borrowing a state statute of limitations that could be contrary to the design and purpose of the IDEA.[68] The court further held that the school district had failed to show that any of its witnesses suffered from a loss of memory or were unavailable and thus failed to show prejudice sufficient to justify a finding of laches.

Actions Under Other Statutes

The Sixth Circuit Court of Appeals held that a student who had succeeded in discrimination claims against an athletic association[69] was not entitled to an award of damages under section 1983.[70] The court held that there was no case authority interpreting the IDEA to allow an award of general damages for emotional injury or injury to a dignitary interest. Since damages were not available under the IDEA, the court held that the student could not recover damages under section 1983 for any violation of rights secured by the IDEA.

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[65] Hebert *ex rel.* Hebert v. Manchester, N.H. Sch. Dist., 833 F. Supp. 80 (D.N.H. 1993).

[66] Wills v. Ferrandino, 830 F. Supp. 116 (D. Conn. 1993); *citing* Conn. Gen. Stat. § 4-183(c).

[67] Bernardsville Bd. of Educ. v. J.H., 817 F. Supp. 14 (D.N.J. 1993).

[68] Murphy v. Timberlane Regional Sch. Dist., 819 F. Supp. 1127 (D.N.H. 1993), *on rem'd from* 973 F.2d 13 (1st Cir. 1992); *see* The Yearbook of Education Law 1993 at 93.

[69] Metropolitan Gov't of Nashville and Davidson County v. Crocker, 908 F.2d 973 (6th Cir. 1990); *see* The Yearbook of Education Law 1991 at 91, 115.

[70] Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 980 F.2d 382 (6th Cir. 1992).

A district court in Indiana held that a school board attorney who rendered legal advice to a state actor that caused the deprivation of a student's federal rights under the IDEA could be sued under section 1983.[71] However, the court held that the attorney in question was entitled to qualified immunity since the attorney's advice did not cause the school board to clearly violate an established federal right.

A state court in Texas ruled that students who were not alleging a denial of a FAPE, but rather were alleging discrimination under section 504, were not required to exhaust administrative remedies under the IDEA.[72] Exhaustion was not required since relief was available only under section 504.

A district court in Oklahoma held that the actions of a teacher who required a mentally handicapped student to clean her excrement from a bathroom floor were so demeaning and harmful to the student that a rational jury could find that they violated the student's substantive due process rights under the Fourteenth Amendment.[73] However, the court found that the student's procedural due process rights were not violated because her parents had been notified of their right to a hearing to challenge her placement but chose not to pursue this option.

Placement

The IDEA regulations require school districts to insure that a "continuum of alternative placements" exists to meet the needs of students with disabilities who are in need of special education and related services.[74] That continuum must range from placement in general education to a private residential facility and also must include homebound services. However, the placement chosen for any given student must be in the least restrictive environment (LRE) for that child and removal from general education can occur only to the extent necessary to provide special education and related services.[75] All placements must be made at public expense and must meet state educational standards.[76] Each placement must be reviewed at least annually and revised if necessary.[77] The Supreme Court has held that an appropriate education is one that is developed in compliance with IDEA procedures and is reasonably calculated to enable the child to receive educational benefits.[78] Although states must adopt policies and procedures that are consistent with the IDEA, they may provide greater benefits than those required by the federal law. If a state does establish higher standards, courts will consider those standards when evaluating the appropriateness of the IEP.[79]

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[71] Bray *ex rel.* Bray v. Hobart City Sch. Corp., 818 F. Supp. 1226 (N.D. Ind. 1993).

[72] University Interscholastic League v. Buchanan, 848 S.W.2d 298 (Tex. Ct. App. 1993).

[73] Gerks v. Deathe, 832 F. Supp. 1450 (W.D. Okla. 1993).

[74] 34 C.F.R. § 300.551.

[75] 34 C.F.R. § 300.550.

[76] 20 U.S.C. § 1401(18).

[77] 34 C.F.R. § 300.552(a)(1).

[78] Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982).

Appropriate Educational Placement

The First Circuit Court of Appeals affirmed a lower court ruling that a public school placement was appropriate for a student with learning disabilities.[80] The district court had determined that the proposed program was staffed by highly experienced and well-credentialed faculty and would cater to the student's full range of needs. On remand from the Fourth Circuit, a district court in Virginia approved a placement in a public school program for a severely learning disabled student after finding that it used an innovative, nontraditional, hands-on approach.[81]

The Third Circuit Court of Appeals approved a lower court's finding that the school district's proposed educational placement was appropriate even though the program in question was in its inception.[82] The lower court had held that the fact that the proposed program was just starting up was not sufficient to render the proposal inappropriate and the appeals court agreed.

The Fifth Circuit Court of Appeals approved a school district's proposal after finding that there was ample evidence that a student had received significant benefit from his special education program and little evidence that he required a more restrictive placement.[83] The evidence the court found persuasive included the facts that the student had advanced in terms of grade level and had become steadily more able to focus on tasks for longer periods of time without frustration. The district court in Maine approved a school district's proposed IEP after determining that it offered the student intensive specialized instruction while allowing him to be mainstreamed.[84] The court noted that parental preference alone could not be the basis for compelling a school district to provide a certain educational placement.

A district court in Virginia approved a public school placement for a student with learning disabilities and an attention deficit disorder after declaring that evidence that the student had benefitted from a private school placement did not establish that the public school program was deficient.[85] The student had unilaterally been placed in the private school by his parents but the court held that the proposed public school program offered a statutorily adequate degree of educational benefit. A Louisiana district court also emphasized that the IDEA does not require a school district to maximize a student's potential.[86] The court noted that the district was not responsible for remedying problems the student had in his home.

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[79] *See, e.g.*, David D. v. Dartmouth Sch. Comm., 775 F.2d 411 (1st Cir. 1985); Geis v. Board of Educ. of Parsippany-Troy Hills, Morris County, 774 F.2d 575 (3d Cir. 1985); THE YEARBOOK OF SCHOOL LAW 1986 at 131.

[80] Lenn v. Portland Sch. Comm., 998 F.2d 1083 (1st Cir. 1993).

[81] Doyle v. Arlington County Sch. Bd., 806 F. Supp. 1253 (E.D. Va. 1992), *on rem'd from* 953 F.2d 100 (4th Cir.); *see* THE YEARBOOK OF EDUCATION LAW 1993 at 91.

[82] Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031 (3d Cir. 1993).

[83] Teague Indep. Sch. Dist. v. Todd L., 999 F.2d 127 (5th Cir. 1993).

[84] Brougham v. Town of Yarmouth, 823 F. Supp. 9 (D. Me. 1993).

The Ninth Circuit Court of Appeals held that a school district had not provided an appropriate placement for a student with multiple disabilities after finding that the student had made little progress toward learning even the most basic skills.[87] Assessments indicated that the student had the capacity to learn communication and self-help skills. A district court in New Hampshire ruled that an IEP calling for mainstreaming was not appropriate for a fifteen-year-old student who read on a first grade level.[88]

An Alabama district court found that a student's IEP was appropriate even though the school district had committed some procedural violations.[89] The court found that the violations were not committed in bad faith and still allowed the parents to participate fully and effectively in the process.

A district court in Pennsylvania held that a school district violated the IDEA by failing to offer a timely IEP and by failing to review and revise IEPs during the pendency of administrative review proceedings.[90] In addition to the procedural violations, the court found that the IEP, which called for ten hours per week of instruction for a pre-school student with a pervasive developmental disorder, was not sufficiently intensive and lacked a mainstreaming component. The court further stated that a change in placement to a more intensive program offered by the school district was not warranted at the time of trial because the student was two-thirds of the way through a program being provided by his parents, which the court deemed was appropriate.

A district court in Nebraska held that a school district could use a modified signing system for three hearing impaired students, instead of the strict signing method requested by their parents, after it determined that the modified method conferred educational benefit on those students.[91] Evidence indicated that the students had shown continued aca-

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85. Lewis v. School Bd. of Loudoun County, 808 F. Supp. 523 (E.D. Va. 1992).
86. Swift v. Rapides Parish Pub. Sch. Sys., 812 F. Supp. 666 (W.D. La. 1993).
87. Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467 (9th Cir. 1993).
88. Manchester Sch. Dist., v. Christopher B., 807 F. Supp. 860 (D.N.H. 1992).
89. Myles S. v. Montgomery County Bd. of Educ., 824 F. Supp. 1549 (M.D. Ala. 1993).
90. Delaware County Intermediate Unit #25 v. Martin K., 831 F. Supp. 1206 (E.D. Pa. 1993).
91. Petersen *ex rel.* Petersen v. Hastings Pub. Sch., 831 F. Supp. 742 (D. Neb. 1993).

demic and lingual improvement throughout their educational experience with the modified method.

Least Restrictive Environment

In a case that has drawn much attention, the Third Circuit Court of Appeals affirmed a lower court's decision that a student with Down's Syndrome should be educated within a general education environment.[92] The Third Circuit adopted the Fifth Circuit's two-part test for determining whether a school district had met its obligation to mainstream a student under the IDEA.[93] The court stressed that school districts must attempt to modify the regular classroom using supplemental aids and services before determining that a student requires a segregated setting. The court stated that a fundamental value of the right to public education included the right to associate with nondisabled peers. However, school districts may compare the benefits a student will receive in the regular classroom against the benefits the child would gain from a segregated special education setting and may consider the possible adverse effect the student may have on other children in the classroom.

The First Circuit Court of Appeals held that a public school placement was appropriate for a student with learning disabilities because it was less restrictive than the private school the parents preferred.[94] The court noted that the public school program addressed the student's needs and struck a suitable balance between the goal of mainstreaming and the state's standard of appropriateness, which required that a program ensure the maximum possible development of the student.

A district court in New Jersey approved the transfer of a student with autism to a facility closer to her home.[95] Noting that the IDEA requires a placement as close to a student's home as possible,[96] the court approved the mother's request to move the student to a facility in her home town.

A district court in New Hampshire found that continued mainstreaming was not appropriate for a student who had made little educational progress in special education programs that included mainstreaming.[97]

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[92] Oberti v. Board of Educ. of the Borough of Clementon Sch. Dist., 995 F.2d 1204 (3d Cir. 1993), *aff'g* 801 F. Supp. 1393 (D.N.J. 1992); *see* The Yearbook of Education Law 1993 at 91, 98, 100.

[93] Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989); *see* The Yearbook of Education Law 1990 at 105.

[94] Amann v. Stow Sch. Sys., 982 F.2d 644 (1st Cir. 1992). *See also* Brougham v. Town of Yarmouth, 823 F. Supp. 9 (D. Me. 1993).

[95] Remis *ex rel.* Trude v. New Jersey Dep't of Human Servs., 815 F. Supp. 141 (D.N.J. 1993).

[96] 34 C.F.R. § 300.552(a)(3).

[97] Manchester Sch. Dist., v. Christopher B., 807 F. Supp. 860 (D.N.H. 1992).

The court held that the student required a private school placement in order to receive an appropriate education.

Private Facilities

The Ninth Circuit Court of Appeals affirmed a district court ruling that a residential placement was warranted for a student with autism who required a twenty-four hours a day, seven days a week, consistent environment in order to benefit from education.[98] The district court had found that daily living skills such as toileting, eating, and dressing could be taught only in a residential setting. A district court in Louisiana held that a twelve-year-old emotionally disturbed student did not require a residential placement because he had been receiving meaningful educational benefit from his public school placement.[99] The court noted that it was not the school district's responsibility to remedy problems the student had in his home.

In an interesting case, the Ninth Circuit Court of Appeals ordered a school district to provide a residential placement for a student with multiple disabilities who had made little progress toward learning even the most basic skills, in spite of assessments indicating that he had the capacity to learn communication and self-help skills.[100] When the only appropriate facility did not have an opening in its residential program, the court ordered the school district to place the student in the school's day program and pay for transportation, caretaker fees, rent, and food while the student resided at his grandparents' home, which was near the private facility. The court stated that these costs should not exceed the costs the school district would incur if the student attended the residential program and that this should only be an interim arrangement until a vacancy in the residential program occurred.

Indiana's process for approving and making residential placements was challenged in two lawsuits. In the first, the district court held that the delays that occurred between the time a student was determined to be eligible for a residential placement and the actual time the placement was made violated the IDEA and was illegal under the supremacy clause of the Constitution.[101] The court found instances of delays as long as 200 days and held that the IDEA required implementation of IEPs as soon as possible after their development.[102] In the second case that same court struck down a provision of state policy that allowed the state to review a hearing officer's decision even when no appeal of that decision had been filed.[103] The court found that this provision violated the finality requirement of IDEA[104] and caused unnecessary delays in actual placements.

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[98] Ash v. Lake Oswego Sch. Dist., 980 F.2d 585 (9th Cir. 1992), *aff'g* 766 F. Supp. 852 (D. Or. 1991); *see* THE YEARBOOK OF EDUCATION LAW 1992 at 100, 103.

[99] Swift v. Rapides Parish Pub. Sch. Sys., 812 F. Supp. 666 (W.D. La. 1993).

[100] Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467 (9th Cir. 1993).

[101] Evans v. Evans, 818 F. Supp. 1215 (N.D. Ind. 1993).

[102] 34 C.F.R. § 300.342(b)(2).

The First Circuit Court of Appeals held that a private school placement was not required after finding that a proposed public school placement was less restrictive but still addressed the student's disabilities.[105] However, a district court in New Hampshire found that mainstreaming was inappropriate for a student who was fifteen-years-old, but read on a first grade level and upheld a hearing officer's order for a private school placement.[106]

Related Services

The IDEA requires school districts to provide related, or supportive, services to students with disabilities if such services are needed to assist the students in benefitting from their special education programs.[107] The Act specifically mentions such developmental, supportive, and corrective services as transportation, speech pathology, audiology, psychological services, physical therapy, occupational therapy, recreation (including therapeutic recreation and social work services), counseling services (including rehabilitation counseling), medical services (for diagnostic or evaluative purposes only), and early identification and assessment as related services.[108] The Supreme Court has held that related services need be provided only to students receiving special education and only those services that are necessary for the child to benefit from special education must be incorporated into the IEP.[109] The only limitation placed on what could be considered a related service is that medical services are exempted unless they are specifically for diagnostic or evaluative purposes.

A district court in Missouri held that a parochial school student was entitled to transportation from the parochial school to special education classes at a local public school.[110] The court found that transportation was a related service under the IDEA and that the Supreme Court had held that public schools may provide transportation to parochial school students without violating the establishment clause.[111]

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103. Bray *ex rel.* Bray v. Hobart City Sch. Corp., 818 F. Supp. 1226 (N.D. Ind. 1993).
104. 20 U.S.C. § 1415(e)(1) states that the decision of an administrative hearing shall be final unless an appeal is made.
105. Amann v. Stow Sch. Sys., 982 F.2d 644 (1st Cir. 1992).
106. Manchester Sch. Dist. v. Christopher B., 807 F. Supp. 860 (D.N.H. 1992).
107. 20 U.S.C. § 1401(a)(17).
108. *Id.*
109. Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984).
110. Felter v. Cape Girardeau Sch. Dist., 810 F. Supp. 1062 (E.D. Mo. 1993).
111. Everson v. Board of Educ. of Ewing, 330 U.S. 1 (1947).

A state court in New York held that a school district was not required to provide a full-time nurse to a student who had been injured in an automobile accident.[112] As a result of injuries sustained in the accident, the student required the services of a nurse at all times during the day. Although a school nurse could perform the required duties, she then would not be available to perform her usual duties. The court held that the requested nursing services were more akin to medical services and the school district was not required to provide them.

Discipline

There are no provisions that specifically refer to discipline within the IDEA; however, disciplinary sanctions as applied to students with disabilities are sometimes the source of litigation. In the past courts have held that IDEA change in placement and status quo provisions were applicable to the disciplinary process. The Supreme Court has held that special education students cannot be expelled for disciplinary reasons where the misconduct is a manifestation of the disability.[113] However, that decision has not left school districts without recourse. Special education students may be temporarily suspended, and are subject to other normal disciplinary sanctions. If necessary a school district may seek court intervention pending completion of administrative due process hearings in situations where it is felt that a student is dangerous and school officials cannot reach an agreement with the student's parents concerning a proper placement. The Supreme Court's decision has significantly lessened the litigation over disciplinary issues as very few cases have been reported since its opinion was issued.

A state court in Pennsylvania held that in-house suspensions were de facto suspensions when the student chose to leave school and school authorities continued to assign in-house suspensions after it became abundantly clear that the student would choose to leave school.[114] The court held that by allowing that pattern to repeat itself, school officials acted contrary to the mandates of the IDEA and state regulations requiring due process before students with disabilities were excluded from school.

Remedies

If a school district fails to provide an appropriate placement for a student with disabilities, the courts are empowered to grant such relief as they determine to be appropriate.[115] The relief granted frequently involves reimbursement of costs borne by the parents in unilaterally obtaining appropriate services. The Supreme Court has ruled that school districts may be required to reimburse parents for costs incurred in providing their child with special education and related services if they prevail in having their chosen placement deemed appropriate.[116] Awards of compensatory education services have been made in situations where the parents did not have the financial means to obtain private services while the litigation was pending.

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[112] Ellison v. Board of Educ. of Three Village Cent. Sch. Dist., 595 N.Y.S.2d 483 (App. Div. 1993).

[113] Honig v. Doe, 484 U.S. 305 (1988).

[114] Big Beaver Falls Area Sch. Dist. v. Jackson, 624 A.2d 806 (Pa. Commw. Ct. 1993).

In 1986 Congress passed the Handicapped Children's Protection Act to allow parents who prevail in a lawsuit pursuant to the IDEA to recover their legal expenses.[117] In 1990 Congress passed legislation to specifically abrogate the states' Eleventh Amendment immunity to lawsuits in the federal courts for any actions that occurred after October 30, 1990.[118] These amendments to the federal special education law were passed in response to Supreme Court rulings that the Act did not allow for recovery of attorney fees by prevailing parents[119] and did not specifically abrogate the states' sovereign immunity.[120]

Damages

The Sixth Circuit Court of Appeals denied a damages award after finding that there was no case authority interpreting the IDEA to allow an award of general damages for emotional injury or injury to a dignitary interest.[121] The court also held that the student was not entitled to a damages award under section 1983 for any violation of rights secured by the IDEA.

Tuition Reimbursement

In a controversial decision, the Supreme Court in *Florence County School District Four v. Carter*[122] held that the parents of a student with disabilities who had enrolled her in an unaccredited private school should be reimbursed for their tuition expenses. In upholding a decision of the Fourth Circuit Court of Appeals, the High Court held that parents were not barred from being reimbursed if their chosen placement was not state approved.[123] The Court stressed, however, that for reimbursement to be warranted, the private school must offer an appropriate program and the school district's proposal must be inappropriate. In this case the school district had conceded that the private school provided an appropriate educational program even though it was not state approved. Another significant factor in the case was the fact that the state did not publish a list of approved facilities so the parents had no way of knowing whether a particular facility was state approved.

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[115] 20 U.S.C. § 1415(e)(2).

[116] School Comm. of Burlington v. Department of Educ. of Mass., 471 U.S. 359 (1985).

[117] 20 U.S.C. § 1414(e)(4)(B) *et seq*

[118] 20 U.S.C. § 1403.

[119] Smith v. Robinson, 468 U.S. 992 (1984).

[120] Dellmuth v. Muth, 491 U.S. 223 (1989).

[121] Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 980 F.2d 382 (6th Cir. 1992).

[122] Florence County Sch. Dist. Four v. Carter, 114 S. Ct. 361 (1993).

A district court in Pennsylvania, relying on the Fourth Circuit Court of Appeals decision in *Florence County* held that parents could be reimbursed for an educational program they had provided in their home using consultants and college students as trainers, even though the trainers were not certified teachers.[124] Stating that the absence of teacher certification is not a bar to reimbursement, the court found that *Burlington's* requirements for reimbursement were met: the school district failed to offer an appropriate program and the program provided by the parents was appropriate. The court further indicated that when a state administrative body rules that parents may place their child in private training, the parents may rely on that ruling until it is overturned or expires.

In another decision that preceded the Supreme Court's ruling in *Florence County*, the district court for the District of Columbia held that parents who had enrolled their child in an unapproved private school were not entitled to tuition reimbursement.[125] That court reasoned that if parents could be reimbursed for a placement at a private school that was not approved, the state would no longer be able to guarantee that it was providing a FAPE.

The Ninth Circuit Court of Appeals affirmed a district court's decision to award tuition reimbursement after determining that the school district had failed to offer an appropriate placement.[126] The court also upheld the lower court's decision that the parents were not entitled to reimbursement for expenses incurred prior to the date in which they requested preparation of an IEP. Similarly, the district court for the District of Columbia held that parents were not entitled to reimbursement for a private school placement because they failed to notify the school district that they wanted to have a new IEP developed.[127] A hearing officer had instructed the parents to contact school officials if they wanted the school district to develop an appropriate IEP.

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[123] Carter v. Florence County Sch. Dist. Four, 950 F.2d 156 (4th Cir. 1991); *see* THE YEARBOOK OF EDUCATION LAW 1993 at 95, 96, 101.

[124] Delaware County Intermediate Unit #25 v. Martin K., 831 F. Supp. 1206 (E.D. Pa. 1993).

[125] Fagan v. District of Columbia, 817 F. Supp. 161 (D.D.C. 1993).

[126] Ash v. Lake Oswego Sch. Dist., 980 F.2d 585 (9th Cir. 1992), *aff'g* 766 F. Supp. 852 (D. Or. 1991); *see* THE YEARBOOK OF EDUCATION LAW 1992 at 100, 103.

[127] Fagan v. District of Columbia, 817 F. Supp. 161 (D.D.C. 1993).

Tuition reimbursement for a residential placement was ordered by a district court in Delaware after it declared that when a hearing panel determined that the state did not have a suitable program available for the student, the student was entitled to a private program.[128] Since a day school option had not been brought before the hearing panel for consideration, the court held that the panel had no power other than to grant a residential placement.

The district court in New Jersey ruled that case law and state regulations did not require parents to commence a timely administrative review before seeking tuition reimbursement.[129] The student's mother had requested the administrative hearing seeking reimbursement two years after she had unilaterally placed her son in a private residential school.

Compensatory Services

The New Hampshire district court awarded two and one-half years of compensatory educational services to a student who was fifteen-years-old, but read on a first grade level in spite of having received special education services since entering school.[130] The court held that a compensatory education award does not first require either a finding of bad faith or a finding of a denial of special education, but rather, is an available remedy when a court finds that a school district has failed to provide an appropriate education. The court also indicated that the appropriate measure for determining the length of the award is the length of the inappropriate placement. In a separate action that same court also awarded two years of compensatory educational services to a student who had not received an appropriate education for two years.[131]

A state court in Pennsylvania held that a student who had been suspended for more days than allowed by state law was entitled to compensatory educational services.[132] The court found that the actions of school officials had interfered with the student's rights to a FAPE and that an award of compensatory educational services was an appropriate remedy.

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[128] Slack v. State of Del. Dep't of Pub. Instruction, 826 F. Supp. 115 (D. Del. 1993).

[129] Bernardsville Bd. of Educ. v. J.H., 817 F. Supp. 14 (D.N.J. 1993).

[130] Manchester Sch. Dist. v. Christopher B., 807 F. Supp. 860 (D.N.H. 1992).

[131] Murphy v. Timberlane Regional Sch. Dist., 819 F. Supp. 1127 (D.N.H. 1993), *on rem'd from* 973 F.2d 13 (1st Cir. 1992); *see* THE YEARBOOK OF EDUCATION LAW 1993 at 93.

[132] Big Beaver Falls Area Sch. Dist. v. Jackson, 624 A.2d 806 (Pa. Commw. Ct. 1993).

Attorney Fees

Two cases involved payment of attorney fees to the parents of students with disabilities who happened to be lawyers. In the first case the federal district court in Maryland held that a parent who acts pro se in IDEA due process proceedings is not entitled to an award of attorney fees.[133] The court interpreted the attorney fees provision of IDEA consistent with title VII of the Civil Rights Act of 1964 and ruled that a parent's pro se status constituted a special circumstance that justified the denial of a fees award. The court further stated that the purpose of the IDEA would not be advanced, and fairness would not be served, by awarding fees to the parents of disabled students just because they were attorneys. In the second case, the Court of Appeals of the District of Columbia held that the school district waived its argument against the availability of fee awards to pro se litigants by failing to raise it in its original opposition to the fee award.[134] The district court had awarded fees to the parents even though the student's father was one of the lawyers who worked on the lawsuit.

The Eighth Circuit Court of Appeals held that a district court had abused its discretion in denying an award of attorney fees to parents who had reached a settlement agreement with the school district but filed court action when the school district failed to comply with the agreement.[135] The appeals court stated that the district court's emphasis on the attorneys' failure to initiate settlement attempts was unreasonable and that the school district's good faith attempt to comply with a settlement agreement was irrelevant. The federal district court in New Jersey held that a parent who succeeded in administrative appeals but had to file court action to seek enforcement of the hearing decision was entitled to attorney fees.[136]

Several cases involved awards of attorney fees for legal services performed prior to an administrative hearing or court action. The outcome of these lawsuits generally depended on the extent to which the attorneys' involvement affected a settlement of the dispute. A Michigan federal district court awarded attorney fees after determining that a settlement was reached after the commencement of a lawsuit.[137] The court held that the legal relationship between the parties changed as a result of the filing of the lawsuit. A district court in California awarded fees when a dispute was settled through mediation.[138] In an interesting case a district court in Georgia awarded attorney fees after concluding that the student's lawsuit prompted legislative action that subsequently resolved the dispute.[139] The student's attorney had helped draft the legislation and the bill's sponsor acknowledged that the lawsuit prompted her to introduce the bill. However, a fee award was denied by an Illinois court after it determined that the school district modified its placement decision because the student's academic performance had improved significantly and not because of the parents' request for a hearing.[140]

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[133] Rappaport v. Vance, 812 F. Supp. 609 (D. Md. 1993).

[134] Kattan v. District of Columbia, 995 F.2d 274 (D.C. Cir. 1993).

[135] Borengasser v. Arkansas State Bd. of Educ., 996 F.2d 196 (8th Cir. 1993).

[136] Remis *ex rel.* Trude v. New Jersey Dep't of Human Servs., 815 F. Supp. 141 (D.N.J. 1993).

[137] Hall v. Detroit Pub. Sch., 823 F. Supp. 1377 (E.D. Mich. 1993).

[138] Masotti v. Tustin Unified Sch. Dist., 806 F. Supp. 221 (C.D. Cal. 1992).

Other IDEA Issues

Two lawsuits involved students who had disabilities as a result of receiving a diphtheria, pertussis, and tetanus (DPT) vaccination. The students in each case had been granted compensation awards under the National Childhood Vaccine Injury Act of 1986.[141] In the first case the United States Court of Federal Claims held that compensation may not be paid out under the Vaccine Act where costs for services can reasonably be expected to be borne by other public or private funds; but that the remedies available under the Vaccine Act are much different than those associated with the IDEA.[142] According to the court the Vaccine Act endeavors to restore the injured party to his former status so that what may be an acceptable educational plan under the IDEA could not be taken as a measure of compensation under the Vaccine Act. The court ruled that compensation was awardable under the Vaccine Act for services not addressed in the student's IEP. In the second case that same court affirmed a special master's award of monetary compensation for purposes of private schooling and speech therapy after finding that services available under the IDEA and state law were not sufficient to meet the student's unique needs.[143]

A state appeals court in New York held that a private school attended by a child with dyslexia was an academic institution, not a hospital as defined by the student's health insurance policy.[144] The court ruled that a policy that covered only defined medical treatments, not educational services, did not cover the costs of a special education school.

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[139] Grinsted v. Houston County Sch. Dist., 826 F. Supp. 482 (M.D. Ga. 1993).

[140] Brown v. Griggsville Community Unit Sch. Dist. No. 4, 817 F. Supp. 734 (C.D. Ill. 1993).

[141] 42 U.S.C. § 300aa-1 *et seq.*

[142] Thomas v. Secretary of Dep't of Health and Human Servs., 27 Fed. Cl. 384 (Ct. Cl. 1992).

[143] McClendon v. Secretary of Dep't of Health and Human Servs., 28 Fed. Cl. 1 (Ct. Cl. 1993).

[144] Schonfeld v. Aetna Life Ins. and Annuity Co., 593 N.Y.S.2d 250 (N.Y. App. Div. 1993).

A Louisiana state appellate court held that the IDEA only applied to a school system's authority to expel or place students with disabilities and did not limit the authority of the juvenile courts.[145] The juvenile court had ordered the student to be placed on homebound instruction after determining that he was a child in need of supervision.

The district court for the District of Columbia held that a school district could not refuse to pay the tuition rate established by private schools.[146] The student involved in this lawsuit attended private schools pursuant to decisions of independent hearing officers. The school district refused to pay the full tuition charged by the private schools and instead paid a tuition rate the district arbitrarily established. The court found that the district's actions were without justification and that the tuition rates charged by the private schools were reasonable.

State Laws

Special education is governed by state law as well as federal law. Each state's special education statutes must be consistent with the IDEA; however, differences do exist. Most states have legislation similar in scope, but several states have requirements that go beyond IDEA's provisions. Some states have higher standards of what constitutes an appropriate education and/or stricter procedural requirements. In other instances state laws establish procedures for special education program implementation that are not explicitly covered by federal law. Federal and state courts frequently are called upon to interpret those provisions.

California

The state constitution provides that when the state mandates a new program or higher levels of services on any local government, the state is to provide funds to reimburse the local government for the costs of the mandate.[147] A lawsuit was filed to determine whether special education programs constituted a new program or higher levels of service mandated by the state, or whether they were mandated by the federal government. The state court of appeal held that the IDEA constitutes a federal mandate and that the Commission on State Mandates was the proper body to consider the question of whether new special education costs were imposed upon local school districts by federal mandate or by state choice.[148]

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[145] Louisiana *ex rel.* B.C., 610 So. 2d 204 (La. Ct. App. 1992).

[146] Fisher v. District of Columbia, 828 F. Supp. 87 (D.D.C. 1993).

[147] CAL. CONST., art. XIII B, § 6.

[148] Hayes v. Committee on State Mandates, 15 Cal. Rptr.2d 547 (Cal. Ct. App. 1992).

Connecticut

A dispute arose concerning which school district was responsible for the costs of a residential placement for a special education student who had been placed in foster care after his mother's death: the school district in which his father resided or the school district in which his foster parent resided. The student's father resided in a nursing home but his parental rights had never been terminated. The state appellate court held that the school district in which the father resided had the responsibility for providing for the student's education.[149]

Indiana

A class action lawsuit was filed alleging that students with disabilities between the ages of eighteen and twenty-one were effectively denied a FAPE. The state law in question automatically terminated services at the end of the school year in which some students turned nineteen and gave local school districts discretion for providing services to other students over the age of eighteen. The state court of appeals held that the IDEA requires states to provide special education services to students between those ages if they provide educational services to nondisabled students between those ages.[150]

Michigan

A discrimination action was brought under Michigan's Handicappers' Civil Rights Act[151] complaining that a school would not allow a student to use her motorized wheelchair. The state court of appeals held that the student was required to submit the claim through administrative procedures established under the state special education law before filing a lawsuit under civil rights legislation.[152]

New York

New York changed its administrative appeals process so that appeals of independent hearing officers were to be heard by a state review officer instead of the Commissioner of Education after July 1, 1990. In an action that was filed on June 27, 1990, and was heard by the review officer, a state appellate court held that the review officer was without jurisdiction.[153]

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[149] Board of Educ. of Bozrah v. State Bd. of Educ., 622 A.2d 614 (Conn. App. Ct. 1993).

[150] Evans v. Tuttle, 613 N.E.2d 854 (Ind. Ct. App. 1993); *citing* 20 U.S.C. § 1412(2)(B) and 34 C.F.R. § 300.300.

[151] Mich. Comp. Laws § 37.1101 *et seq.*

[152] Jenkins v. Carney-Nadeau Pub. Sch., 505 N.W.2d 893 (Mich. Ct. App. 1993), *citing* MICH. COMP. LAWS § 380.1701 *et seq.*

In a lawsuit alleging that a student's standardized test scores had been altered to prevent him from receiving special education services, a state trial court held that claims of educational malpractice were barred under case law.[154] However, in this instance the court found that the complaint alleged more than just poor professional judgment. The court stated that the claim alleged willful, intentional conduct that had the effect of denying the student benefits to which he was entitled and that the alleged action was not within the discretion of school officials.

Decisions were handed down by two state appeals courts in an action that has received much publicity concerning the creation of a special school district whose boundaries were contiguous with the village inhabited by a Satmar Hasidic sect. The trial court had held that the law creating the special school district violated the establishment clause of the First Amendment.[155] The appellate division and the state's highest court both affirmed.[156] The high court held that the statute creating the district was impermissible under the establishment clause as interpreted by the United States Supreme Court in *Lemon v. Kurtzman*.[157] The court found that the statute allowed a religious community to dictate where secular public educational services would be provided and created a symbolic union of church and state. The United States Supreme Court has granted certiorari.

Ohio

The Supreme Court of Ohio held that when a local school district proposes to place a student with disabilities in a program operated by a county board of mental retardation and developmental disabilities, the county board may not refuse to accept the child.[158] The court stated that if the county objected to the placement, it must do so through administrative procedures established by the state.

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[153] Board of Educ., Commack Union Free Sch. Dist. v. Fernandez, 590 N.Y.S.2d 310 (N.Y. App. Div. 1992).

[154] Helbig v. City of N.Y., 595 N.Y.S.2d 585 (N.Y. Sup. Ct. 1993).

[155] Grumet v. New York State Educ. Dep't, 579 N.Y.S.2d 1004 (N.Y. Sup. Ct. 1992); *see* THE YEARBOOK OF EDUCATION LAW 1993 at 106.

[156] 592 N.Y.S.2d 123 (App. Div. 1992), *aff'd sub nom.* Grumet v. Board of Educ. of the Kiryas Joel Village Sch. Dist., 601 N.Y.S.2d 61 (1993).

[157] 403 U.S. 602 (1971).

[158] Board of Educ. of Austintown Local Sch. Dist. v. Mahoning County Bd. of Mental Retardation and Developmental Disabilities, 613 N.E.2d 167 (Ohio 1993).

Pennsylvania

In a lawsuit where a school district petitioned for review of the Secretary of Education's order disapproving state reimbursement of the costs of related services personnel in the school district's budget, a state court held that the Secretary's action was proper.[159] The court found that related services personnel were not listed in the state education code of persons whose salary and retirement fund benefits were reimbursable.

Discrimination Under the Rehabilitation Act, Section 504

Section 504 of the Rehabilitation Act of 1973, as amended, provides that "[n]o otherwise qualified individual with handicaps . . . shall, solely by reason of his or her handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance . . . ."[160] Section 504 effectively prohibits any recipient of federal funds from discriminating against individuals with disabilities in the provision of services or employment. Section 504 applies to any agency that receives federal funds, not just schools. For that reason this section includes several selected cases that did not arise in a school context, but that contain legal principles that are applicable to educational programs and institutions.

A person is considered to have handicaps under section 504 if the person has a physical or mental impairment that substantially limits one or more of the person's major life activities, has a record of such an impairment, or is regarded as having such an impairment.[161] Major life activities are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[162] The Supreme Court has held that a person is otherwise qualified for purposes of section 504 if the person is capable of meeting all of a program's requirements in spite of the handicap.[163] If a person is otherwise qualified, a recipient of federal funds is expected to make reasonable accommodations for the person's disabilities unless doing so would create an undue hardship.[164]

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[159] Bethlehem Area Sch. Dist. v. Carroll, 616 A.2d 737 (Pa. Commw. Ct. 1992).

[160] 29 U.S.C. § 794.

[161] 29 U.S.C. § 706(7)(B).

[162] 34 C.F.R. § 104.3(j)(2)(ii).

[163] School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273 (1987); Southeastern Community College v. Davis, 442 U.S. 397 (1979).

[164] 34 C.F.R. § 104.12(a)

Students

Elementary and Secondary. Students with disabilities at the elementary and secondary level have rights under section 504 as well as the IDEA. Often students and their parents file lawsuits that state claims under both statutes. Frequently the claims stated under one statute are identical or similar to the claims stated under the other statute; however, sometimes distinct claims are stated under section 504.

The district court for the District of Columbia remanded the case of a student who had been diagnosed as having an Attention Deficit Hyperactivity Disorder to a hearing officer for a determination as to whether the student should receive special education services under section 504.[165] The court stated that under appropriate circumstances a hearing officer could order a school district to provide special education services to a student designated as otherwise qualified handicapped under section 504. However, the court cautioned that section 504 does not require affirmative efforts to overcome a disability but simply prevents discrimination on the basis of a handicap. Thus, the provision of special education services beyond those necessary to eliminate discrimination would exceed the scope of aid authorized under section 504.

A state court in Texas held that an interscholastic league's denial of a waiver from a rule prohibiting students over the age of nineteen to participate in interscholastic sports discriminated against two students with disabilities.[166] The students had been retained in grades due to their disabilities and thus were over the age of nineteen in their senior year. The court found that the league granted waivers of other rules so that granting a waiver for disabled students over the age of nineteen would be a reasonable accommodation.

A district court in Illinois held that section 504 is applicable to correctional facilities since those facilities had elected to provide educational services to inmates and received federal funds for that purpose.[167] Several school-aged detainees in a county jail had filed suit seeking special education services.

Higher Education. The federal district court in Maine found that a student who had been denied admission to a university as a transfer student was not academically qualified for admission.[168] The court held that the university was not required to lower its admission standards to accommodate disabled applicants. Prior to applying for the transfer the student had attended three other colleges where he acquired a grade point average of 1.98. Testimony at the trial indicated that the universi-

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165. Lyons *ex rel.* Alexander v. Smith, 829 F. Supp. 414 (D.D.C. 1993).
166. University Interscholastic League v. Buchanan, 848 S.W.2d 298 (Tex. Ct. App. 1993).
167. Donnell C. v. Illinois State Bd. of Educ., 829 F. Supp. 1016 (N.D. Ill. 1993).
168. Halasz v. University of New England, 816 F. Supp. 37 (D. Me. 1993); *see also* 821 F. Supp. 40 (D. Me. 1993).

ty had never accepted a transfer student with a grade point average that low into its regular program. The university did, however, accept the student into a special program for students with disabilities with the provision that he would be accepted into the regular program if he attained a grade point average of 2.0 for two consecutive semesters. After two semesters in the special program his grade point average was only 1.375 and he was denied admission into the regular program. Similarly, the Fifth Circuit Court of Appeals held that a law school was not required to lower its academic standards or compromise the reasonable policies of its academic program to accommodate a student who had failed to achieve the requisite grade point average for advancement.[169]

A district court in Illinois found that a law school's refusal to certify an epileptic student's bar application could prevent the student from practicing law.[170] Officials from the law school had given the student a poor recommendation and as a result the board of law examiners required the student to undergo an interview prior to his admission to the bar. The court held that the student's disparate treatment claims stated a claim under section 504.

A district court in Nebraska held that a college's policy prohibiting the assignment of a roommate to a student with disabilities who required the services of a personal care attendant violated section 504.[171] The court found that the student was otherwise qualified to participate in the roommate assignment program and ruled that a blanket policy, as opposed to individualized inquiry, violated section 504.

Employees

Discrimination Claims. A federal district court in Pennsylvania dismissed the discrimination claims of an alcoholic employee who was fired after she violated the terms of a last chance agreement she had signed with the Postal Service.[172] The court found that she had been fired because she had been absent from work more than allowed under the last chance agreement, not because of her alcoholism. Similarly, the Fourth Circuit Court of Appeals held that an alcoholic special agent with the FBI was not terminated because of his alcoholism but because he was intoxicated while on duty.[173] The court stated that section 504 does not prevent an employer from dismissing an employee for egregious misconduct just because the employee happens to be disabled.

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[169] McGregor v. Louisiana State Univ. Bd. of Supervisors, 3 F.3d 850 (5th Cir. 1993).

[170] Rothman v. Emory Univ., 828 F. Supp. 537 (N.D. Ill. 1993).

[171] Coleman v. Zatechka, 824 F. Supp. 1360 (D. Neb. 1993).

[172] Golson-El v. Runyon, 812 F. Supp. 558 (E.D. Pa. 1993).

[173] Little v. Federal Bureau of Investigation, 1 F.3d 255 (4th Cir. 1993).

The district court in the District of Columbia dismissed the discrimination claims of a United States Park Police officer who had been denied a scheduled promotion because he had been placed on limited duty due to a temporary back injury.[174] The court found that the temporary injury did not qualify as a handicap under section 504 and that the officer could not perform the functions of the promotional position in spite of the injury. Similarly, a district court in Virginia held that impairments that are minor and widely shared (e.g., arthritis) are not covered by section 504.[175] The District of Columbia Court of Appeals held that the fact that an agency had made accommodations in the past for employees who had developed medical problems after being assigned, but denied similar accommodations to an employee requesting a transfer, did not establish handicap discrimination.[176]

The District of Columbia federal district court held that the policy of the Superior Court of not permitting blind individuals to serve on juries violated section 504.[177] The court found that visual observation was not necessarily an essential function of a juror and that blindness alone did not disqualify a person from serving on many juries. Interestingly, the court noted that a blind person had once served as a judge in the Superior Court.

The district court in Maryland dismissed the discrimination claims of an employee who failed to submit requested medical documentation that he was fit to work after an absence of more than four years.[178] The court held that the employee was dismissed because of his failure to comply with the request for medical documentation, not because of his handicap.

Otherwise Qualified Individuals with Disabilities. A district court in Florida held that an employee's manic depressive disorder did not constitute a handicap under section 504 since it did not limit one or more of her major life activities.[179] The court further determined that she was not otherwise qualified because her illness prevented her from working a night shift, which was an essential function of the position for which she was hired.

The Fifth Circuit Court of Appeals found that employees with insulin dependent diabetes or vision impairments were not handicapped under section 504 since these conditions did not limit major life activities.[180]

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[174] Paegle v. Department of Interior, 813 F. Supp. 61 (D.D.C. 1993).

[175] Buko v. American Medical Laboratories, 830 F. Supp. 899 (E.D. Va. 1993).

[176] Barth v. Gelb, 2 F.3d 1180 (D.C. Cir. 1993).

[177] Galloway v. Superior Court of D.C., 816 F. Supp. 12 (D.D.C. 1993).

[178] Wilson v. Amtrack Nat'l R.R. Corp., 824 F. Supp. 55 (D. Md. 1992); *see also* Doe *ex rel.* Lavery v. Attorney Gen. of the United States, 814 F. Supp. 844 (N.D. Cal. 1992).

[179] Mackie v. Runyon, 804 F. Supp. 1508 (M.D. Fla. 1992).

[180] Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993).

The court further held that their employer did not consider them to be handicapped just because it believed that they were unable to drive without creating a safety hazard. The court ruled that drivers who could not operate a motor vehicle without endangering themselves or others were not otherwise qualified.

A California district court held that if an individual's disability is a contagious disease, that person is not otherwise qualified if he poses a significant risk of transmission of the disease to others in the workplace.[181] The lawsuit had been filed by a physician who alleged that the Federal Bureau of Investigation suspended his examination of agents based solely on reports that he was afflicted with AIDS. However, the court found that the Bureau's decision was not based on the physician's disability, but rather was based in part on his refusal to provide information about his medical condition.

The district court in Rhode Island held that obesity that is caused by systemic or metabolic factors beyond an individual's control could be a physiological condition qualifying as a handicap.[182] However, obesity that is a transitory or self-imposed condition resulting from an individual's voluntary action or inaction would not be a physiological disorder or a handicap.

Reasonable Accommodation. The Seventh Circuit Court of Appeals held that section 504 calls for reasonable accommodations that allow handicapped employees to lead normal lives, not merely accommodations that facilitate the performance of employment tasks.[183] The court reversed and remanded a lower court ruling that a Department of Education employee had failed to show that she was discriminated against when she was denied a requested maternity leave for the purpose of adopting a child.[184] The employee could not bear children due to physical handicaps and could not specify in advance the dates of her required leave as required by her employer. The appeals court, however, held that her requested change in standard operating procedure was the very essence of a reasonable accommodation. Using a similar reasoning, the Ninth Circuit Court of Appeals held that transferring an employee to another job location where he could obtain better medical treatment was not per se unreasonable under the Rehabilitation Act.[185] The court found that employers are not relieved of their obligation to provide reasonable accommodations just because an employee already is able to perform the essential functions of his position. The court stated that employees may require reasonable accommodations to enjoy the privileges of employment on an equal basis with nondisabled workers and to pursue treatment or therapy for their disabilities.

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[181] Doe *ex rel.* Lavery v. Attorney Gen. of the United States, 814 F. Supp. 844 (N.D. Cal. 1992).

[182] Cook v. Rhode Island Dep't of Mental Health, Retardation, and Hosps., 834 F. Supp. 57 (D.R.I. 1992).

[183] McWright v. Alexander, 982 F.2d 222 (7th Cir. 1992).

[184] McWright v. Alexander, 771 F. Supp. 256 (N.D. Ill. 1991); *see* The Yearbook of Education Law 1992 at 111.

[185] Buckingham v. United States, 998 F.2d 735 (9th Cir. 1993).

The Eighth Circuit Court of Appeals reversed and remanded a lower court decision that van drivers who had been transferred to positions as van aides because of their disabilities could not be reasonably accommodated.[186] The appeals court held that material issues of fact existed as to whether the school district could accommodate the drivers and that the burden was on the school district to show that accommodations were not reasonable.

A district court in Florida held that a Postal Service employee, who had requested a transfer to a day shift after her physician advised her that a disruptive sleeping schedule hindered the stabilizing effects of her medication, could not be accommodated.[187] The court found that she did not have the requisite seniority for a day shift under the terms of the collective bargaining agreement. The court stated that her rights under section 504 did not prevail over other employees' rights under the collective bargaining agreement. The District of Columbia Court of Appeals held that an employer may consider the adverse effect on the morale of other employees when determining whether granting an accommodation would create a hardship.[188]

The federal district court in Rhode Island held that a reasonable accommodation is a modification of the conditions under which a particular job must be performed so as to permit a handicapped person to perform it in spite of the handicap.[189] The court found that an employer did not make a reasonable accommodation by agreeing to hire an applicant if she reduced her weight to under 300 pounds. The Sixth Circuit Court of Appeals held that a hospital had not met its burden showing that a reasonable accommodation was not possible when it discharged a nurse who had a back injury without any prior indication that her job performance was unsatisfactory.[190]

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[186] Wood v. Omaha Sch. Dist., 985 F.2d 437 (8th Cir. 1993), *rev'g* 784 F. Supp. 1441 (D. Neb. 1992); *see* THE YEARBOOK OF EDUCATION LAW 1993 at 113.

[187] Mackie v. Runyon, 804 F. Supp. 1508 (M.D. Fla. 1992).

[188] Barth v. Gelb, 2 F.3d 1180 (D.C. Cir. 1993).

[189] Cook v. Rhode Island Dep't of Mental Health, Retardation, and Hosps., 834 F. Supp. 57 (D.R.I. 1992).

[190] Tuck v. HCA Health Servs. of Tenn., 7 F.[illegible]d 465 (6th Cir. 1993).

Other Section 504 Issues

Section 504 does not contain a statute of limitations for filing a lawsuit so one must be borrowed from analogous state law. The Fourth Circuit Court of Appeals held that the appropriate statute of limitations for section 504 action in Virginia was the state's one-year period established by the Virginia Rights of Persons with Disabilities Act, which was patterned after the Rehabilitation Act.[191] The court reversed and remanded the district court's ruling that the appropriate statute of limitations was two years.[192] The federal district court in Connecticut held that the applicable statute of limitations period in section 504 cases was the three-year period for civil rights cases since discrimination actions based on disability resemble other civil rights claims.

The Supreme Court of Pennsylvania held that the Commonwealth Court's raising of section 504 as an affirmative defense in a case involving school bus drivers was jurisprudentially unsound where that Act had not been raised as a defense in proceedings before the trial court or on appeal.[193] The high court held that the Commonwealth Court did not have the power to introduce section 504, since none of the parties had addressed the applicability of the Act to the issues in question.

The district court in Maine denied an award of attorney fees to a university after determining that a student's legal action against the school was not frivolous, unreasonable, or groundless.[194] The court did, however, award reimbursement of litigation costs to the university, holding that the student's lack of resources did not constitute a bar to his payment of costs.

The Sixth Circuit Court of Appeals held that employees with disabilities who work for recipients of federal funds are not required to exhaust administrative remedies before taking their claims to court.[195] The court contrasted this with the situation of employees of federal agencies who are required to exhaust administrative remedies prior to filing court action.

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[191] Wolsky v. Medical College of Hampton Roads, 1 F.3d 222 (4th Cir. 1993), *citing* Va. Code Ann. §§ 8.01-243, subd. A, 51.5-40 to 51.5-46.

[192] Wolsky v. Eastern Virginia Medical Auth., 795 F. Supp. 171 (E.D. Va. 1992); *see* The Yearbook of Education Law 1993 at 115.

[193] Pennsylvania Dep't of Transp. v. Boros, 620 A.2d 1139 (Pa. 1993), *rev'g* Pennsylvania Dep't of Transp. v. Brown, 558 A.2d 121 (Pa. Commw. Ct. 1989); *see* The Yearbook of Education Law 1990 at 120.

[194] Halasz v. University of New England, 821 F. Supp. 40 (D. Me. 1993). *See also* 816 F. Supp. 37 (D. Me. 1993).

[195] Tuck v. HCA Health Servs. of Tenn., 7 F.3d 465 (6th Cir. 1993).

Americans With Disabilities Act

The Americans with Disabilities Act (ADA),[196] which was enacted in 1990, is designed to prohibit discrimination against persons with disabilities in a wide range of activities sponsored by private as well as public entities. The ADA's greatest impact is on the private sector; however, since many of its provisions are similar in scope to those of section 504, lawsuits filed under the ADA should interest consumers of education law. Generally, compliance with section 504 will result in compliance with the ADA; however, several provisions of the ADA addressed loopholes in section 504 and codified judicial interpretations of the Rehabilitation Act.

Students

A district court in Illinois held that a poor recommendation based on a student's disability would violate the ADA.[197] The student involved in the lawsuit suffered from epilepsy and school officials had written to the state board of law examiners giving the student a poor recommendation. As a result of that recommendation, the board subjected the student to an interview prior to his admission to the bar.

The federal district court in Nebraska stated that the ADA prohibits using assumptions about individuals with disabilities rather than making decisions based on facts and conclusions gleaned from an individualized inquiry.[198] The court dismissed as unfounded a college's contentions that a wheelchair bound student would utilize more than half of a dormitory room and that visits from her personal care attendant would be disruptive. The court struck down the college's blanket policy of not assigning roommates to students who required attendant services finding that such a policy violated the ADA.

A district court in New York held that the purpose of the ADA was to guarantee that those with disabilities are not disadvantaged and are placed on an equal footing with others; however, they are not to be given an unfair advantage.[199] The court ordered the state board of law examiners to provide an applicant for the bar examination with requested accommodations, holding that the plaintiff's physician's testimony was to be given great weight where there was no medical evidence to the contrary.

A district court in Nebraska held that use of a modified signing system by the school district with three hearing impaired students, as opposed to a strict signing method preferred by their parents, did not violate the students' rights under the ADA.[200] The court found that the modified signing method was no less an effective means of communication than the method advocated by the parents.

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[196] 42 U.S.C. § 12101 *et seq.*

[197] Rothman v. Emory Univ., 828 F. Supp. 537 (N.D. Ill. 1993).

[198] Coleman v. Zatechka, 824 F. Supp. 1360 (D. Neb. 1993).

[199] D'Amico v. New York State Bd. of Law Examiners, 813 F. Supp. 217 (W.D.N.Y. 1993).

Employees

A federal district court in Illinois held that factual issues concerning whether an employee who had been diagnosed with terminal cancer was qualified to perform his job precluded summary judgment in an ADA discrimination lawsuit.[201] Evidence indicated that the employee was able to work long hours even though he had to take time off for treatment and had been given only six to twelve months to live. The court also found that his inability to drive could be reasonably accommodated. A district court in Virginia held that an employee with bronchial asthma was not entitled to a completely smoke-free work environment under the ADA because he was able to perform the essential functions of his position with the reasonable accommodations already made by his employer.[202] The employer had provided smokeless ashtrays and air purifiers, and had banned smoking in all areas except designated smoking areas.

A district court in Pennsylvania found that the ADA requires a public entity to take the opportunity to make its facilities accessible whenever it undertakes new construction or makes alterations to new facilities.[203] The court held that curb ramps were required on all newly constructed or altered streets and that resurfacing a street was an alteration under ADA.

Other ADA Issues

The district court for the District of Columbia held that the Superior Court violated the ADA by disqualifying a juror due to his blindness, noting that a blind person had once served as a judge on that same court.[204] The court found that visual observation was not necessarily an essential function of a juror.

A district court in Wisconsin, finding that title II of the ADA[205] adopted the remedies, rights, and procedures of section 505 of the

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[200] Petersen *ex rel.* Peterson v. Hastings Pub. Sch., 831 F. Supp. 742 (D. Neb. 1993); *citing* 28 C.F.R. § 34.104.

[201] United States Equal Employment Opportunity Comm'n v. AIC Sec. Investigation, Ltd., 820 F. Supp. 1060 (E.D. Ill. 1993).

[202] Harmer v. Virginia Elec. and Power Co., 831 F. Supp. 1300 (E.D. Va. 1993).

[203] Kinney v. Yerusalim, 812 F. Supp. 547 (E.D. Pa. 1993); *citing* 28 C.F.R. § 35.151(e).

[204] Galloway v. Superior Court of D.C., 816 F. Supp. 12 (D.D.C. 1993).

[205] 42 U.S.C. § 12131 *et seq.*

Rehabilitation Act,[206] held that a plaintiff need not exhaust administrative remedies prior to bringing court action.[207] The court further noted that the regulations interpreting ADA and its legislative history supported this finding.

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[206] 29 U.S.C. § 794(a).

[207] Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276 (W.D. Wis. 1993).

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TORTS

William J. Evans, Jr.

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Introduction

The purpose of tort law is to provide remedies to individuals for harm which resulted from the unreasonable conduct of others. A tort is a civil wrong, other than breach of contract, for which a court provides relief in the form of damages. State laws provide the basis for most actions, which are predicated on the principle that individuals are responsible for the consequences of their conduct. The major categories into which tort actions can be grouped are: negligence, which involves conduct that falls below an acceptable standard of care resulting in injury; intentional torts, where such actions as assault, battery, defamation, and false imprisonment are committed with the desire to do harm; and strict liability, where an injury results from the creation of an unusual hazard.

This chapter examines cases reported during 1993 which involved tort claims within the school context. Included are cases involving school officials, school employees, students, and others who were visiting school grounds. Cases arising out of interscholastic sports are covered in another chapter.

In the first case, the State of New York did not recognize a claim of educational malpractice as a cause of action. However, allegations that a principal intentionally altered a student's standardized test scores was actionable. The suit alleged that the principal caused the student to be denied remedial or special education despite his poor classroom performance.[1]

Negligence

Negligence is the most common tort alleged to have been committed by school personnel. Such a charge can result when an improper act, or a failure to act, causes injury to another person. There also must be a causal relationship between the alleged conduct and the injury sustained. In these cases, the behavior of school personnel is measured against what a reasonable and prudent professional of similar training and experience would have done, or should have done, in the same or similar circumstances.

Injuries

Schools are responsible for maintaining a safe and healthy environment in which learning can take place. The following cases are divided into categories according to where or how injury was sustained, and where the defense advanced was not a claim of sovereign or statutory immunity.

Off School Property and After School Hours. Ohio parents brought an action against the school board and a board employee on behalf of themselves and their minor daughter. The action was filed the day before the daughter reached the age of majority. They alleged that the employee had tortiously seduced their daughter and sought loss of consortium and other damages. The decision for the defendants was reversed on appeal with the case remanded for further consideration. The court held that even though the daughter executed a release upon reaching the age of eighteen, this did not serve to bar the parent's claim.[2]

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[1] Helbig *ex rel.* Helbig v. City of N.Y., 597 N.Y.S.2d 585 (N.Y. Sup. Ct. 1993).

A Louisiana mother brought an action arising from severe injuries her daughter sustained on a kindergarten school field trip. The court ruled that the state agency which owned the playground could not be held liable for the injuries the child sustained when she was struck by a large metal swing. However, the school board was found negligent in allowing kindergarten students to use swings which posed an unreasonable risk of harm to small children.[3]

An Ohio drum major was attempting to light a fire-baton with a gasoline/kerosene fuel. Some of the fuel ignited injuring a majorette from a visiting school. In the action for damages, the school district was granted summary judgment which was reversed on appeal. The court found a genuine issue of material fact as to whether the band director had acted in a wanton or reckless manner.[4]

An Indiana driver was injured in a traffic accident after proceeding through an intersection at the direction of a stopped school bus driver. Although the injured driver had violated traffic regulations by failing to yield the right-of-way, such a violation may be overcome by evidence that the driver acted as a reasonably prudent person would act under the circumstances. In reversing a summary judgment for the bus driver and school district, the court found issues of material fact as to whether a reasonable person would have interpreted the bus driver's signal as an indication she could safely pass in front of the bus and across the entire street.[5]

A Louisiana fourth grade student was injured in an altercation with another student after school. The student had been escorted outside by his teacher, but returned to the building to find his sister. In reversing the trial court decision for the student, the court found nothing to indicate that the school sanctioned the presence of students on school grounds after dismissal. While it is foreseeable that parents will occasionally send children back into the school building, it was deemed unreasonable and unworkable to require a school to immediately intercept such children.[6]

An Ohio middle school student was physically and sexually assaulted by three male students after school. The girl had stayed to work on a science project, while the males had been in after-school detention. The males had been seen in the halls and were advised to leave the premises, although they were not formally escorted out of the building. The suit against the school district alleged a failure to provide adequate care, supervision, or protection. The court found that the attacks were unforeseeable and thus the district did not owe the student either the duty of protecting her, or of escorting the three male students from the building.[7]

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[2] White v. Rhodes, 607 N.E.2d 75 (Ohio Ct. App. 1992).

[3] Glankler v. Rapides Parish Sch. Bd., 610 So. 2d 1020 (La. Ct. App. 1992). *See* Contreras v. Carbon County Sch. Dist. #1, 843 P.2d 589 (Wyo. 1992). A mother who witnessed her child injured before school was unable to receive damages for emotional distress.

[4] Minnick v. Springfield Local Schs. Bd. of Educ., 611 N.E.2d 926 (Ohio Ct. App. 1992).

[5] Claxton v. Hutton, 615 N.E.2d 471 (Ind. Ct. App. 1993).

[6] Hickingbottom v. Orleans Parish Sch. Bd., 623 So. 2d 1363 (La. Ct. App. 1993).

An elementary school student was struck in the eye by a screwdriver thrown by another student on school grounds while school was not in session. The injured student failed to show that the New York school had notice of the condition which caused the injuries. The screwdriver was not school property and there was no evidence of how long it had been on the playground.[8]

A New York student was injured while playing a game on school property during the summer while school was not in session. The student's action against the school district and security company was unsuccessful. The student was held to have assumed the risk of injury. Neither the security company nor the school district were found to owe a duty to the student, and neither entities' acts or omissions were proximate causes of the student's injuries.[9]

The representative of a deceased student's estate brought a wrongful death action against a Nebraska school district and the driver who was operating a van on a school sponsored ski trip. The suit alleged that the district negligently entrusted the transportation of the decedent to the parent who was driving the van. The court granted summary judgment to the district, finding that reasonable minds could differ as to whether the parent was an agent of the school district.[10]

A Georgia school employee worked full time as a delivery man and part time as a custodian. He used his private vehicle to, from, and between the jobs. Suit was brought against him and the school district following an accident between his vehicle and another. The court found that the school board was not vicariously liable for injuries sustained which occurred after the employee had finished his first job but before he had begun the second.[11]

School Settings During School Hours. Students who were sexually abused by their teacher brought an action against the teacher, school board, and several school employees. Claims made by two of the students were dismissed based on the statute of limitations. Under the Tennessee version of the discovery rule they could not delay filing the suit until they became fully aware that they had been "emotionally harmed." Questions of fact remained as to whether the hiring of the teacher came within the discretionary function exception to the Governmental Tort Liability Act.[12]

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[7] Williams v. Columbus Bd. of Educ., 610 N.E.2d 1175 (Ohio Ct. App. 1992). *See* Siegmann v. Buffington, 604 N.E.2d 1038 (Ill. App. Ct. 1992). A principal did not disregard a student's safety by failing to station a monitor in a school parking lot.

[8] Mix v. South Seneca Cent. Sch. Dist., 602 N.Y.S.2d 467 (N.Y. App. Div. 1993).

[9] Kelly v. Great Neck Union Free Sch. Dist., 597 N.Y.S.2d 136 (N.Y. App. Div. 1993).

[10] McCurry v. School Dist. of Valley, 496 N.W.2d 433 (Neb. 1993).

[11] Riel v. Paulding County Bd. of Educ., 425 S.E.2d 305 (Ga. Ct. App. 1992).

Summary judgment was denied to a New Jersey school district in a case involving the sexual assault of students by their teacher. The court held the molestation of a child is presumed to result in a compensable physical injury even if the injury only manifests itself in psychological problems.[13]

An action alleging breach of duty of supervision was brought on behalf of a New York student who was sexually assaulted by two other students. In finding for the student, the court pointed to the classroom teacher's violation of the school's safety regulations. In particular, the child was sent out of the classroom even though a bathroom in the classroom was available, at a time when at least one other student was wandering the school premises unattended. In addition, the child's mother had established the potential for harm as she had complained to the teacher of threats to her daughter by one of the students involved in the assault.[14]

The failure of a middle school teacher to appropriately respond to pleas by a student who was being harassed by classmates resulted in a successful negligence action against a South Carolina school district. The student's leg was broken in a fight that occurred outside the classroom with two students who sat next to him in class. The record showed that the teacher was aware that the seating arrangement of a classroom could be used for behavioral management. Specifically, there was a failure to "exercise slight care."[15]

A seventh grade Florida student was injured while walking back to her classroom from the cafeteria. Another student had repeatedly tried to trip her. Following a verbal exchange, the student punched her in the face. The ensuing negligent supervision case resulted in a directed verdict for the school board which was reversed on appeal. The court held that questions for a jury remained as to whether the teacher supervising the students exercised a reasonable standard of care, and whether the teacher's alleged negligence was the proximate cause of the injury.[16]

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[12] Doe v. Coffee County Bd. of Educ., 852 S.W.2d 899 (Tenn. Ct. App. 1992).

[13] A.C.R. *ex rel.* L.R. v. Vara, 625 A.2d 41 (N.J. Super. Ct. Law Div. 1992).

[14] Shante D. v. City of New York, Bd. of Educ. Local Sch. No. 5, 598 N.Y.S.2d 475 (N.Y. App. Div. 1993).

[15] Smart v. Hampton County Sch. Dist. No. 2, 432 S.E.2d 487 (S.C. Ct. App. 1993).

[16] Roberson v. Duval County Sch. Bd., 618 So. 2d 360 (Fla. Dist. Ct. App. 1993).

The mother of a Florida student went to her son's school to pick up material needed for home study by her son while he recovered from an injury. While she was walking down a school corridor, a sixteen-year-old student approached her and struck her in the mouth with his fist. In her action for damages, the trial court found for the school district. That decision was reversed on appeal as evidence created issues of fact as to whether the school board was on notice because of the student's violent nature and past actions.[17]

A personal injury action was brought against a school district alleging that a four-year-old special education student had been sexually abused by a teacher's aide. Upholding the lower court, the Supreme Court of Montana found no evidence to support a negligence claim against the school district despite a pediatrician's conclusion that it was likely that the student had been sexually assaulted.[18]

During a morning recess, a California student was struck in the eye by a dirt clod thrown by another student. The student had witnessed the throwing activity for a period of time before choosing to join in. The student's action for damages alleged school district negligence as the proximate cause of the injury. The summary judgment granted the district was reversed on appeal. The court found the doctrine of implied assumption of risk did not bar the district from liability. There was a clearly defined legal duty on the part of the school district to prevent precisely what had occurred.[19]

A New York junior high school student was injured when he was pushed in the hallway by another student. His action for damages was unsuccessful as the injury was held a result of the act of an intervening third party under circumstances which could not have reasonably been anticipated.[20]

While an Ohio high school student was attending a diesel mechanics class, he joined a group of students talking near the lab doors. When he turned to leave, he was bitten by a dog brought to school by one of the other students. His complaint against the school board alleged negligent supervision. The court found no evidence suggesting that the board or its security employee should have been aware that a student would bring a dog to school. The court explained that unless a more specific obligation is assumed, the school officials are bound only under the common law to exercise the care necessary to avoid reasonably foreseeable injuries.[21]

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17. Garufi v. School Bd. of Hillsborough County, 613 So. 2d 1341 (Fla. Dist. Ct. App 1993).
18. S.M. v. R.B., 862 P.2d 1166 (Mont. 1993).
19. Lucas v. Fresno Unified Sch. Dist., 18 Cal. Rptr.2d 79 (Cal. Ct. App. 1993).
20. McGregor v. City of N.Y., 602 N.Y.S.2d 669 (N.Y. App. Div. 1993).
21. Nottingham v. Akron Bd. of Educ., 610 N.E.2d 1096 (Ohio Ct. App. 1992).

En route to and from School. A fifth grade South Carolina student was struck and killed by an automobile while attempting to cross a highway on her way home. The student had been suspended from riding the school bus for disciplinary reasons. The wrongful death action, brought by the student's mother, resulted in a directed verdict for the school district. That verdict was reversed on appeal as it was held that there remained a question for a jury as to whether failure by the district to insure that the child's mother received actual notice of the bus suspension constituted gross negligence.[22]

An occupant of an automobile was involved in an accident with a West Virginia school district bus. Although she was uninjured in the accident, she broke her leg when she slipped on an icy road after departing her vehicle. The court held that it was a matter for the jury as to whether negligence by the bus driver in causing the traffic accident could be considered the proximate cause of the post-accident injury.[23]

A six-year-old Tennessee student was struck by an automobile after departing his school bus. The child's mother, who would meet him each day and accompany him across the street, was not present as the arrival time of the bus had been changed. The change, made as a result of an alteration in the bus route to alleviate overcrowding, had not been communicated to the mother. In the parent's successful action for damages, the court held that one of the "uses" of a school bus was to provide protection for children crossing busy streets.[24]

A Louisiana first grade student was injured when she was struck by a pickup truck when she attempted to run across the street after school. The school board was held liable for the child's injuries as the record revealed no supervision policy for dismissed students. The school board was determined to have abdicated its responsibility to reasonably supervise its youngest students.[25]

A jury award to a New York high school student was upheld on appeal. The student was injured when assaulted by two students she had tried to avoid while leaving school. Fearing for her safety, the student had communicated her concern to a teacher she located near the exit. The court found this report, as well as the student's attempt to report threats to the security office, constituted sufficient notice of a particular danger at a particular time. Furthermore, the lack of security personnel on the veranda and outside the first-floor was evidence the board of education breached its duty to provide adequate supervision at a time when such supervision was most critical.[26]

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[22] Hollins v. Richland County Sch. Dist. One, 427 S.E.2d 654 (S.C. 1993).
[23] Weese v. Muir, 425 S.E.2d 218 (W. Va. 1992).
[24] Bowers *ex rel.* Bowers v. City of Chattanooga, 855 S.W.2d 583 (Tenn. Ct. App. 1992).
[25] Gary v. Menche, 626 So. 2d 901 (La. Ct. App. 1993).
[26] Mirand v. City of N.Y., 598 N.Y.S.2d 464 (N.Y. App. Div. 1993).

The going and coming doctrine holds that an employer is not responsible for the employee's acts if the employee is traveling to or from work. That doctrine was cited by the court in its denial of a claim made by a pedestrian who was struck by a vehicle driven by an Oklahoma school art facilitator. Although the employee left her home on the day of the accident in furtherance of school business, she was on her way home at the time of the accident.[27]

The mother of an eleven-year-old hearing impaired girl brought an action against a Texas school district claiming the negligent hiring and supervising of a bus driver alleged to have sexually molested the girl. The court granted a summary judgment to the school district. The district did not have access to a criminal background check and was not required to make such a check at that time. Furthermore, the district supervisors did not know or suspect that the driver molested children, and took immediate action when notified.[28]

A thirteen-year-old Indiana student was struck by a car while crossing the road directly in front of his house immediately after disembarking his school bus. Summary judgment for the school bus company was reversed on appeal and the case was remanded for trial. Rejecting a defense of contributory negligence, the court found issues of material fact as to whether negligence on the part of the bus company in planning the bus routes was the proximate cause of the accident. In addition, the practice by the bus driver of merely waiting until the student got off the bus and then pulling away was not seen as conduct meeting the standard of care of a prudent pupil transportation organization.[29]

A fourteen-year-old West Virginia student was struck by an automobile after departing her school bus. In the negligence case that followed, there was a directed verdict for the school board which was reversed on appeal. It was seen as a matter for trial whether the bus driver acted with reasonable care in turning off the safety lights and proceeding into the flow of traffic when the student was running towards the rear of the bus.[30]

After she was let off a school activity bus, a thirteen-year-old Washington student was struck and killed by an automobile. The school bus driver and school district were found negligent as a matter of law. The driver had failed to activate the bus stop bar and warning lights prior to letting the student off. In addition, the driver failed to keep the student in view at all times and to require her to cross in front of the bus.[31]

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[27] Taylor v. Pate, 859 P.2d 1124 (Okla. Ct. App. 1993).

[28] Musgrave v. Lopez, 861 S.W.2d 262 (Tex. Ct. App. 1993).

[29] Bockmeyer v. Fort Wayne Pub. Transp., 614 N.E.2d 605 (Ind. Ct. App. 1993).

[30] Yeager v. Morgan, 429 S.E.2d 61 (W. Va. 1993).

[31] Yurkovich v. Rose, 847 P.2d 925 (Wash. Ct. App. 1993).

A five-year-old District of Columbia student was injured while attempting to cross the street en route to school. In his action for damages he claimed a special relationship of protection existed with the city. The court found that the duty owed did not extend to a child who attempted to cross the street 200 yards from the designated crosswalk.[32]

A New Mexico high school student was injured when she skipped or hopped backwards off the sidewalk and was struck by an automobile. The accident occurred at or near a crosswalk which featured flashing school zone signals. Since the student had been kept after school for detention, the signals had stopped flashing before the accident. In the parent's action for damages, summary judgment was granted to the school district. The parent's contended that the school district was responsible for maintaining the crosswalk and signals in front of the school. The court failed to find any legislative intent for a school district to have responsibility for street safety devices when it was only authorized to provide advice.[33]

An eleven-year-old Tennessee student went to the school office complaining of feeling ill. Unable to reach her father by phone, she asked that one of her father's co-workers come pick her up. The co-worker asked the child's uncle, who was employed with the father, to pick up the girl. The uncle raped the child on the way home causing serious physical and emotional injuries. The parent's action against the principal, secretary, and school board alleged that the school was negligent in releasing the child. Although the school board had a policy that students could not leave school premises during the day without the request of the parent/guardian and the approval of the principal, violation of the policy was not found to amount to negligence per se. The child had attempted to contact a parent, and showed no hesitancy in leaving with her uncle. Under these circumstances, the school was determined to have no notice that the person signing the child out posed a threat. Even if the conduct of the defendants did amount to negligence, the court still believed the case failed because the negligence was not the proximate cause of an unforeseeable injury.[34]

A South Carolina high school student sued her school district for negligence after she was attacked by a nonstudent while riding the school bus home. The bus driver had notified the district director of transportation regarding an earlier conflict which involved the student. The director contacted the students involved in the prior altercation, and attempted to contact their parents. The court found that the district had exercised at least slight care with its responsibility to protect the student and thus was not grossly negligent.[35]

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[32] Stoddard v. District of Columbia, 623 A.2d 1152 (D.C. Ct. App. 1993). *See* Pletan v. Gaines, 494 N.W.2d 38 (Minn. 1992). The school district's bus transportation policy gave the district discretionary function immunity for the fatal injury to a student walking home.

[33] Johnson v. School Bd. of Albuquerque Pub. Sch. Sys., 845 P.2d 844 (N.M. Ct. App. 1992). *See* Gilmore v. City of Zion, 605 N.E.2d 110 (Ill. App. Ct. 1992). The school district did not have the duty to provide a crossing guard after the school day had begun.

[34] Snider v. Snider, 855 S.W.2d 588 (Tenn. Ct. App. 1993).

School Buildings and Grounds. A physically and mentally disabled member of a boy scout troop drowned while attending an aquatic camp at a pool owned and operated by a New Mexico school district. The court held that the operation of a swimming pool was not an inherently dangerous activity giving rise to strict liability, and the school district could not be liable for the negligent acts of an independent contractor. However, in remanding the case the court found genuine issues of fact concerning direct negligence by the school district. Specifically, should the district have provided lifeguards?[36]

A California elementary school was determined to have negligently allowed a dangerous condition to exist with regards to a small loading area used by parents to pick up students. Suit had been brought to recover for injuries students sustained when a car jumped a curb striking them. The court held it reasonable to conclude that by the omission of precautionary measures the dangerous condition was maintained.[37]

While running across a New York kindergarten yard, a woman slipped on a brown paper bag and injured her back. The court found that the city had constructive notice of the conditions which caused the injury and was therefore liable.[38]

A New York grandmother accompanied her grandchildren to a school's summer lunch program. After lunch, she descended the steps from the lunchroom and slipped and fell on food and debris left on the stairway. In the grandmother's action for damages, the decision for the school district was reversed on appeal. The court found error in the exclusion of testimony at trial that the condition had existed every day that summer. This could have demonstrated the possibility that the condition which led to the accident was recurrent so as to place the school district on constructive notice of a dangerous condition.[39]

An action was brought on behalf of a child who drowned in a school district's swimming pool which was being operated by a Pennsylvania township. The court held the contract between the township and the school district did not impose liability for personal injuries on the town-

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35. Clyburn v. Sumter County Sch. Dist. 17, 429 S.E.2d 862 (S.C. Ct. App. 1993).
36. Seal v. Carlsbad Indep. Sch. Dist., 860 P.2d. 743 (N.M. 1993).
37. Constantinescu v. Conejo Valley Unified Sch. Dist., 20 Cal. Rptr.2d 734 (Cal. Ct. App. 1993).
38. Hirschman v. City of N.Y., 597 N.Y.S.2d 154 (N.Y. App. Div. 1993).
39. Scott v. Board of Educ. of City of N.Y., 597 N.Y.S.2d 385 (N.Y. App. Div. 1993).

ship. Furthermore, the township was not in possession of the pool at the time of the accident for the purpose of providing a real estate exception to governmental immunity.[40]

Negligence Defenses

Immunity

Traditionally, the most commonly used defense has been governmental immunity. One premise is that school districts lack the legal ability to pay tort claims since public funds can only be used for statutorily prescribed purposes. Increasingly, legislative and judicial inroads have restricted the use of this defense. Still, in the nineteen cases involving an immunity defense, school districts were found liable in only two.

Common Law (Governmental Immunity). An Alabama teacher was found immune from liability for negligent supervision of a middle school student who was injured while she was monitoring halls during or immediately after the change of classes. The teacher was determined to have been performing a discretionary function.[41]

Two other Alabama teachers were found to be performing a discretionary function by supervising students on a playground during recess. They were thus immune from liability for injuries suffered by a second grade student who was injured by another student.[42]

An action for damages was brought on behalf of a Missouri student who was injured when he was struck by an automobile after getting off a school bus. At issue was whether the director of transportation was acting in such a capacity as to be immune. The court found that his responsibilities primarily required the exercise of his professional judgment rather than the performance of routine tasks. This made his acts discretionary, making him entitled to immunity.[43]

A Georgia first grade student was sexually battered by a physical education teacher after her classroom teacher had allowed her to go unescorted to the bathroom. The school board was held to have sovereign immunity from liability. Also, unless the district had reasonable grounds for believing that a criminal act would be committed, it could not be held liable in tort for the superseding criminal act by a third party.[44]

A high school student fractured his elbow when he slipped on ice in a courtyard which provided the main access between two buildings of a

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[40] Sims v. Silver Springs-Martin Luther Sch., 625 A.2d 1297 (Pa. Commw. Ct. 1993).

[41] Coyle v. Harper, 622 So. 2d 302 (Ala. 1993).

[42] Kroger *ex rel.* Kroger v. Davis, 622 So. 2d 303 (Ala. 1993).

[43] Webb v. Reisel, 858 S.W.2d 767 (Mo. Ct. App. 1993).

[44] Thurmond v. Richmond County Bd. of Educ., 428 S.E.2d 392 (Ga. Ct. App. 1993).

Connecticut high school. In the action for damages brought on behalf of the student, the superintendent, school district, and city, were granted summary judgment. The duty to salt and sand the courtyard rested with the head custodian and, as a common law government official, the superintendent could not be held vicariously liable for the acts of a subordinate. The identifiable person exception to governmental immunity did not apply as it was not apparent that the failure to care for the courtyard placed only the student in imminent harm. Finally, since the claim of negligence against the superintendent failed, so did the derivative claims on the school board and city.[45]

A Missouri student sued his school district for injuries he sustained when he was hit with a piece of asphalt thrown by a classmate. Finding for the district, the court held that the dangerous condition of property exception to sovereign immunity was not applicable to a claim based on a theory of improper supervision. Even if the condition of the asphalt was dangerous, by not alleging direct causation, the claim was insufficient to invoke the exception.[46]

Statutory Immunity. A Pennsylvania child sued a school district for injuries he received while riding a merry-go-round. The court held that the district was not entitled to immunity. The device was real property with a defect which caused the child's injuries. The district was found negligent regarding the care, custody, and control of the merry-go-round thus making the real estate exception to immunity applicable.[47]

The decision in a California junior high school student's action for damages due to sexual molestation was reversed on appeal. The court denied that the school district had immunity from suit as it had an affirmative duty to take all reasonable steps to protect its students from sexual assaults by teachers.[48]

A personal injury action was brought against the teacher of a twelve-year-old Ohio student following the administration of corporal punishment. The court found the teacher immune from liability as the paddling had been in accordance with school policy in the face of the student's continuing misbehavior after other methods of punishment had failed.[49]

A Michigan student was killed and her sister injured when they were struck by an automobile on the way to their bus stop. Since there were a number of factors which contributed to the accident, the school bus driver and director of transportation were found immune from liability. Their actions were not seen as the proximate cause of the children's injuries.[50]

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[45] Burns v. Board of Educ. of Stamford, 621 A.2d 1350 (Conn. Ct. App. 1993).

[46] Patterson v. Meramec Valley R-III Sch. Dist., 864 S.W.2d 14 (Mo. Ct. App. 1993).

[47] Norwin Sch. Dist. v. Cortazzo, 625 A.2d 183 (Pa. Commw. Ct. 1993).

[48] Virginia G. v. ABC Unified Sch. Dist., 19 Cal. Rptr.2d 671 (Cal. Ct. App. 1993).

[49] Rinehart v. Board of Educ. Western Local Sch. Dist., 621 N.E.2d 1365 (Ohio Ct. App. 1993).

In Houston the school district and a bus driver were sued following an accident that killed one student and injured another. The driver had allowed the students to get off the bus at a nondesignated stop, after which they were picked up by a friend who later had the fatal accident. The court found the district and driver immune from liability. The court explained that sovereign immunity barred suit for injury when the allegations of negligence were related to the direction, control, and supervision of students.[51]

An action was brought on behalf of a Utah high school student who was severely beaten by two fellow students. He had complained to the school principal that the two students had previously assaulted him on two occasions. It was alleged that the school district, principal, and a teacher were guilty of negligent supervision. While stating that it is unfortunate that a parent who is required to send his or her child to school lacks a civil remedy against negligent school personnel, the court still found the defendants immune from liability. The court explained that the legislature had spoken clearly on the issue of immunity, and the injury arose out of a battery not a failure to supervise.[52]

The insurer of an Illinois contractor brought suit against the board of education following the injury to a masonry worker. The court found the city board of education statutorily immune from liability based on the condition of the school playground. This was true even though the injured worker entered the property at the request of the school board and not for recreational purposes.[53]

A Michigan child was injured when the bicycle she was riding struck a concrete "island" at the edge of a circular drive in front of an elementary school. The accident occurred in the evening, after the close of the school year, when most of the exterior lights were turned off. The school district successfully advanced an immunity defense. Two exceptions sought by the plaintiff were rejected. The court held that the public building exception no longer applies to dangers presented on school property or adjacent to a public school building. The public highway exception was not applied as the court declined to expand the concept of "public highway" to include public school driveways and parking lots.[54]

A five-year-old child was injured when she fell from a slide on the grounds of an Oklahoma school. The grounds were unattended at the

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50. Dedes v. South Lyon Community Schs., 502 N.W.2d 720 (Mich. Ct. App. 1993).
51. Goston v. Hutchison, 853 S.W.2d 729 (Tex. Ct. App. 1993).
52. Ledfors v. Emery County Sch. Dist., 849 P.2d 1162 (Utah 1993).
53. Hanover Ins. Co. v. Board of Educ. of Chicago, 608 N.E.2d 183 (Ill. App. Ct. 1992).
54. Richardson v. Warren Consol. Sch. Dist., 496 N.W.2d 380 (Mich. Ct. App. 1992).

time as it was summer and school was not in session. The school district was successful in advancing a statutory immunity defense of the action brought on behalf of the child. First, the acquisition of liability insurance did not serve to waive immunity. Since the school's insurance policy only covered those liabilities imposed by law, the coverage did not create liability where the school would otherwise be legally exempt. Second, the district was found exempt from allegations of a failure to inspect an attractive nuisance. Finally, the risk of falling from a slide was seen as one which a child would regularly encounter, and therefore the district had no duty to warn the child of the risk.[55]

A personal injury action was brought against a West Virginia town, volunteer fire company, board of education, and city. In finding for the defendants, the court held constitutional the statute immunizing a political subdivision from liability if the claim was covered by workers' compensation.[56]

A child that was injured while sledding on school property was determined to have been pursuing one of the statutorily enumerated recreational activities for which immunity is granted. Therefore, the New York school district could not be held liable for the injuries sustained by the five-year-old.[57]

An Oregon high school student was cut by a knife during a fight with another student during lunch. Her action against the school district and officials alleged negligent supervision. The court found no evidence the school district had specific knowledge that a fight was occurring or would occur and then failed to intervene in a timely manner. The choice by the district on the number and allocation of security personnel involved matters of discretion for which the district was protected by statutory immunity.[58]

An Illinois high school student was injured while playing basketball on an outdoor court next to school. His charge of negligence against the school district cited clearly visible trenches in the playing surface. He supported his position with the doctrine of distraction claiming that he was distracted from the condition by the nature of a basketball game. In finding for the district, the court said the doctrine cannot overcome the limitation on the immunity from liability of a public entity to only willful and wanton conduct.[59]

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55. Brewer v. Independent Sch. Dist. #1, 848 P.2d 566 (Okla. 1993). *See* Lindler v. Duplin County Bd. of Educ., 425 S.E.2d 465 (N.C. Ct. App. 1993). The purchase of liability insurance did not waive a school board's sovereign immunity from liability.
56. O'Dell v. Town of Gauley Bridge, 425 S.E.2d 551 (W. Va. 1992).
57. McGregor v. Middletown Sch. Dist. No. 1, 593 N.Y.S.2d 609 (N.Y. App. Div. 1993).
58. Mosley v. Portland Sch. Dist. No. 1J, 843 P.2d 415 (Or. 1992).
59. Oropeza v. Board of Educ. of Chicago, 606 N.E.2d 482 (Ill. App. Ct. 1992).

Other Defenses

Assumption of Risk. The doctrine of assumption of risk was not applicable in an action brought by a Pennsylvania school employee injured when he slipped on an accumulation of ice and snow. The court did not find this a viable defense where the school district was found to owe the employee a duty to keep the public sidewalks free from any dangerous conditions.[60]

Comparative Negligence. A first grade Louisiana student was struck and killed by an automobile while attempting to cross the street after school. Parents of the child brought a wrongful death action, the dismissal of which was successfully appealed. The court held the school board breached its duty to its students by failing to adopt and implement a procedure which would require the verification of the presence of crossing guards. That decision was also appealed on the issue of allocation of fault. The court reversed the portion of the decision which assigned 25% of the blame to the child. No error was found in the allocation of 50% blame to the driver of the vehicle. The city and school board were determined to bear equally the remaining 50% of the fault. The city's employee, the crossing guard, was absent from her post due to illness but did not notify either the police department or school district of that fact. She further stated that she had never been informed that she should call if she was going to be absent. The principal knew it was her responsibility to monitor the attendance of the crossing guards. By participating in the benefits of the guard program, the school board voluntarily assumed the duty of verifying that the crossing guard would be at her post. That duty was breached when the school board failed to adopt a procedure of verification.[61]

Notice of Claim. The timely notice of claim requirement is designed to allow defendants an opportunity to investigate a claim while the facts surrounding it are still recent. Failure to make timely notice can be grounds for dismissal of a complaint. In only four of the fourteen notice cases were plaintiffs allowed to file late notice.

In defense of an action by an Arizona school district to recover for the cost of asbestos removal, a manufacturer sought to apply a statute of limitations. The court held that the statute of limitations did not apply to a school district regardless of whether the cleanup was a proprietary or governmental function.[62]

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[60] Giosa v. School Dist. of Philadelphia, 630 A.2d 511 (Pa. Commw. Ct. 1993).

[61] Barnes v. Bott, 615 So. 2d 1337 (La. Ct. App. 1993).

[62] Tucson Unified Sch. Dist. v. Owens-Corning Fiberglas Corp., 849 P.2d 790 (Ariz. 1993). *See* Adams Pub. Sch. Dist. v. Asbestos Corp. Ltd., 7 F.3d 717 (8th Cir. 1993). The statute of limitations was tolled while the school district participated in a national class action.

A former student was allowed to file a late notice of claim with a New York school district based on alleged incidents of abuse by a teacher. The student received treatment for psychiatric problems attributed to the alleged incidents and was also experiencing problems with her family so that she could not go to them for guidance. While only fourteen or fifteen years old at the time, she did attempt to serve notice within one month of turning eighteen. Finally, the court was unable to conclude that the school district had been substantially prejudiced in defending against the claim as a result of the late filing.[63]

A New York student was able to serve a notice of claim more than a month later than the applicable ninety-day period. The student's accident, which occurred on a school apparatus during a weekend, was reported to the school and school nurse a day or two later. The court held that reporting the incident provided the district with actual knowledge of the essential facts of the claim.[64]

The summary judgment which held that an Oregon motorist had failed to file timely notice of an accident she had with a school employee was reversed on appeal. The court found material issues of fact remained as to when she could reasonably have discovered that the employee was acting in the course of her employment.[65]

Parents of a student who had been sexually assaulted were time-barred from bringing a section 1983 action against the responsible teacher. Colorado's two-year limitations period on personal injury actions was held applicable.[66]

Following the suicide of a Wisconsin high school student, her parents filed notice of a claim of negligence against the school district. The district served a notice of disallowance almost five months after the claim. The parents commenced an action which was later dismissed for failure to serve the summons within sixty days. That dismissal was reversed on appeal with the court finding that once a claim against a governmental body was statutorily disallowed, the statute's six-month limitation period would not apply to actions brought on that claim.[67]

The guardian of a South Carolina student who sustained serious head injuries in a school bus accident sought to file a late notice of claim against the State Department of Education. The court found no justifi-

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63. Meredithe v. Carmel Cent. Sch. Dist., 597 N.Y.S.2d 199 (N.Y. App. Div. 1993). *See* South Bend Community Schs. Corp. v. Widawski, 622 N.E.2d 160 (Ind. 1993) and Sanna v. Bethpage Pub. Schs., 597 N.Y.S.2d 483 (N.Y. App. Div. 1993). Late notice was allowed due to the infancy of the petitioner.
64. Tortorici v. East Rockaway Pub. Sch. Dist. No. 19, 594 N.Y.S.2d 335 (N.Y. App. Div. 1993). *See* Anderson v. Brewster Cent. Sch. Dist., 593 N.Y.S.2d 91 (N.Y. App. Div. 1993).
65. Krieger v. Just, 843 P.2d 473 (Or. Ct. App. 1992).
66. Blake v. Dickason, 997 F.2d 749 (10th Cir. 1993).
67. Blackbourn v. School Dist. of Onalaska, 497 N.W.2d 460 (Wis. Ct. App. 1993).

cation for allowing a claim against a governmental entity a year and a half after the two-year statute of limitations.[68]

A New York school superintendent was unable to return to work following a severe heart attack. Shortly after his retirement, he requested payment for unused sick leave and vacation time. While those claims were held timely, the superintendent's cause of action for failure of the school district to purchase disability benefits was not. The action "accrued" for the purpose of timely notice when he became aware of the inaction by the district.[69]

A New York teacher unsuccessfully sought damages for salary withheld while he was incarcerated for child abuse. The teacher claimed that since he was not suspended without pay, he should be compensated, while the district reasoned that he was not paid because he did not report to work. The court held that it was unnecessary to resolve the issue as the teacher was not attempting to pursue the kind of public interest that would remove the necessity of filing a notice of claim.[70]

A different result came in a Michigan case. A city school board and several hundred public school districts brought a class action against asbestos manufacturers and sellers. All of the districts' products liability claims were time-barred. Under the discovery rule, the limitations period began to run when the districts became aware of the hazards of asbestos use and of the presence of airborne asbestos particles in schools.[71]

The parents of a New York student, who had allegedly been sexually abused, were unsuccessful in their attempt to serve a late notice of claim. Although the infancy of the victim could have served to extend the time limit, the court found it unclear as to how specific the information was which had been provided the school district. Specifically, this involved knowledge of when a criminal investigation of the child's teacher began. The period involved in the claim came anywhere from four months to two and one half years after the claims arose. Under the circumstances, the prejudice caused by the delay was determined to outweigh the disability of infancy.[72]

The victim of an automobile accident with a school bus sued the bus driver for personal injury. The court held that the action was barred by the one-year statute of limitations covering suits against local govern-

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68. Green v. Lewis Truck Lines, 433 S.E.2d 844 (S.C. 1993).
69. Pope v. Hempstead Union Free Sch. Dist. Bd. of Educ., 598 N.Y.S.2d 814 (N.Y. App. Div. 1993).
70. Jackson v. Board of Educ., Colton-Pierrepont Cent. Sch. Dist., 598 N.Y.S.2d 842 (N.Y. App. Div. 1993).
71. Detroit Bd. of Educ. v. Celotex Corp., 493 N.W.2d 513 (Mich. Ct. App. 1992).
72. Donald E. v. Gloversville Enlarged Sch. Dist., 594 N.Y.S.2d 385 (N.Y. App. Div. 1993).

ment entities or their employees. A two-year limit based on a suit against the driver in her individual capacity was rejected.[73]

While working at a New York school, an employee was injured when she slipped from a chair. She completed an accident report that day, but did not file a notice of claim for over six months. The court held that the employee was not entitled to serve late notice lacking a reasonable excuse for the delay. Furthermore, she failed to show that the board of education had actual notice of the facts surrounding the accident, in particular the basis of a claim of negligence.[74]

A New York school employee was not allowed to serve a late notice of claim. He sought exception based on the fact that he believed the matter was controlled by workers' compensation. The court also held the claim that the condition of the premises had not changed did not negate the principle that there is a real danger of changed conditions with late notice.[75]

Liability Insurance

The North Carolina Tort Claims Act was not found to bar an action against the individual bus driver whose negligence resulted in a wrongful death. The driver's insurance company was determined to have accepted premiums in exchange for a commitment to provide payment for unsatisfied damages. In this instance that would be damages exceeding the maximum allowed under the Tort Claims Act.[76]

A Massachusetts school bus owner filed a third-party complaint against its business motor vehicle insurer seeking to invoke the insurer's duty to indemnify and defend in a case where a student was sexually assaulted by a school bus driver. Within the context of the policy, "accident" was defined to include deliberately wrongful conduct involving a passenger in the school bus. The court found for the school bus owner as the sexual assault was determined to be an accident arising from the ownership, maintenance, or use of the insured bus.[77]

The insurer under a California teacher's liability policy sought determination of its duty to defend or indemnify the teacher in a student's action for damages as a result of the teacher's sexual misconduct. The court held that the insurer can be required to defend the teacher in such an action. The mere fact that the insurer could not indemnify the teacher for acts of molestation, this did not eliminate its duty to defend other, possibly covered claims.[78]

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[73] Racich v. Anderson, 608 N.E.2d 972 (Ill. App. Ct. 1993).
[74] Rodriguez v. New York City Bd. of Educ., 593 N.Y.S.2d 519 (N.Y. App. Div. 1993).
[75] Hurley v. Avon Cent. Sch. Dist., 591 N.Y.S.2d 643 (N.Y. App. Div. 1992).
[76] Oakley v. Thomas, 434 S.E.2d 663 (N.C. Ct. App. 1993).
[77] Roe v. Lawn, 615 N.E.2d 944 (Mass. Ct. App. 1993).

A different result was reached in a New York case. A board of education was unable to establish that its liability insurer had a duty to defend in a sexual harassment and retaliatory discharge action. The court held the teacher's allegations did not constitute an occurrence within the meaning of the general liability policy.[79]

A Minnesota school district sued its liability insurer seeking coverage for the expenses resulting from two lawsuits brought against it. One of the cases involved alleged acts of age discrimination, while the other was by a principal seeking reinstatement. On the first case, the court held that the coverage clause which indemnifies "wrongful acts" covered the school district for alleged acts of intentional discrimination. In the second instance, the policy language covering "losses and expenses" was held to include the mishandling of employment rights.[80]

A North Carolina school board filed an action for a declaration as to whether its liability policy provided coverage for allegations asserted against the board and a coach by a student the coach allegedly raped. Examining the language of the policy, the court concluded that the coach could not be covered as he was not employed in an administrative position, nor was he acting within the scope of his duties. The policy was found to cover the school board as the allegations fell under the wrongful acts definition.[81]

Attorney Fees

A Florida student was unsuccessful in an attempt to recover for injuries he sustained in an impromptu game of "piling on." The court's decision also awarded attorney fees to the school board. The award was reversed on appeal. The court found that even though the applicable statutes had been amended to allow such an award, at the time of the decision attorney fees could be awarded only if the plaintiff prevailed.[82]

An unincorporated association of property owners sought reimbursement for attorney fees they expended pursing a section 1983 action. They had challenged an Ohio school board's policy of requiring prior approval for persons to speak at board meetings. The court remanded

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78. Horace Mann Ins. Co. v. Barbara B., 846 P.2d 792 (Cal. 1993).
79. Board of Educ. of East Syracuse-Minoa Cent. Sch. Dist. v. Continental Ins. Co., 604 N.Y.S.2d 399 (N.Y. App. Div. 1993).
80. Independent Sch. Dist. No. 697, Eveleth, Minn. v. St. Paul Fire and Marine Ins. Co., 495 N.W.2d 863 (Minn. Ct. App. 1993).
81. Durham City Bd. of Educ. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 426 S.E.2d 451 (N.C. Ct. App. 1993).
82. Brodose v. School Bd. of Pinellas County, Fla., 622 So. 2d 513 (Fla. Dist. Ct. App. 1993).

the case for a determination of reasonable fees. This was based on the fact that the plaintiffs attained at least some relief on the merits of their claim.[83]

Employee Injuries/Workers' Compensation

A New York school district was not found liable for injuries sustained by a vocational teacher as no special duty to provide security was found. The teacher was injured in attempting to remove a weapon from a student and take him to the principal's office. Specifically, he alleged that he was unable to summon security personnel because the intercom system had not been kept in good repair.[84]

Another New York teacher claimed that the injuries she sustained preventing the assault of one student by another could have been prevented in either of two ways. A posted security guard could have taken action, or the student with allegedly known propensities for violence could have been removed from school. The court held the matter of pupil placement to be a matter of educational policy which lies within the discretion of the administration of public schools. Also, the teacher failed to show that the school board owed her a special duty of protection.[85]

A Washington substitute school custodian was injured when a garbage can fell off its wheels and struck her leg. The trial court decision was reversed on appeal as the court was found to have erroneously defined the term "temporary total disability" and improperly usurped the role of the jury in evaluating evidence of disability.[86]

A computer repairman was injured when he slipped and fell on a piece of luncheon meat. In his action for damages against the school district, summary judgment for the district was reversed on appeal. That decision was reversed by the California Supreme Court. Ordinary slip and fall does not in itself justify the conclusion that negligence is the most likely explanation. There was no evidence the district or its employees created the alleged dangerous condition.[87]

An Arkansas school bus driver was also employed full time at another job. Following a bus-related injury she sought temporary total disability payments during her recovery. The court held that she could not receive

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83. Citizens Against Tax Waste v. Westerville City Sch., 985 F.2d 255 (6th Cir. 1993). *See* Fenton v. Query, 605 N.E.2d 1303 (Ohio Ct. App. 1992). The plaintiffs who were successful in a § 1983 case were entitled to attorney fees.
84. Jacobellis v. City of N.Y., 602 N.Y.S.2d 877 (N.Y. App. Div. 1993).
85. Brady v. Board of Educ. of City of N.Y., 602 N.Y.S.2d 892 (N.Y. App. Div. 1993).
86. Hunter v. Bethel Sch. Dist. and Educ. Serv. Dist. No. 121, Worker's Compensation Trust, 859 P.2d 652 (Wash. Ct. App. 1993).
87. Brown v. Poway Unified Sch. Dist., 843 P.2d 624 (Cal. 1993).

benefits while holding "any other employment." However, since she was working two jobs when she was injured, the second job was not "any other employment" undertaken in the place of her part-time bus driving job.[88]

An assistant band director from Pennsylvania successfully withstood an appeal of compensation benefits. The court held that returning from an evening band parents event was an exception to the "going and coming" rule. Since the assistant director was going to be replacing the band director during a leave of absence, attending the event was seen as a "special mission" of ensuring the continued cooperation between the band director and the band parents.[89]

A mental disorder, even if not accompanied by physical trauma to the body, was found to be a compensable injury in a Connecticut action. A music teacher's mental injury was determined to have been as a result of unproven allegations of sexual misconduct by a student.[90]

A Florida middle school teacher was injured during a student/teacher basketball game conducted during school hours. Teachers were required to participate in the game either as players or spectators. The court found the game to be an incident of her employment and thus awarded compensation.[91]

The wife of a deceased principal was awarded workers' compensation benefits. The Oklahoma school unsuccessfully challenged the award which was based on a finding of death due to work-related stress. Citing the medical testimony presented at trial, the court upheld the award explaining that only when competent evidence is lacking can the trial court's decision be overturned.[92]

A Virginia school employee was unable to prove that her employer had acted in a manner which induced her to refrain from filing a claim. The actions were seen as no more than would be expected from an employer conscientiously complying with the Workers' Compensation Act.[93]

A Louisiana teacher sought workers' compensation benefits for injuries she suffered in separate incidents in which she was allegedly assaulted by students. Following the first injury, the school board paid benefits until the teacher returned to work. The court found that the injuries from the second assault manifested themselves at that time and that the teacher failed to show that she was entitled to supplemental earnings benefits from the first incident.[94]

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[88] Stevens v. Mountain Home Sch. Dist., 850 S.W.2d 335 (Ark. Ct. App. 1993).

[89] City of Monessen Sch. Dist. v. Workmen's Compensation Appeal Bd. (Hays), 624 A.2d 734 (Pa. Commw. Ct. 1993).

[90] Crochiere v. Board of Educ. of Enfield, 630 A.2d 1027 (Conn. 1993).

[91] Highlands County Sch. Bd. v. Savage, 609 So. 2d 133 (Fla. Dist. Ct. App. 1992).

[92] Ponca City Pub. Schs. v. Ritcheson, 853 P.2d 782 (Okla. Ct. App. 1993). *See* Thomas v. Workmen's Compensation Appeal Bd., 621 A.2d 1192 (Pa. Commw. Ct. 1993). The employer was unable to have compensation benefits modified.

[93] Cheski v. Arlington County Pub. Schs., 434 S.E.2d 353 (Va. Ct. App. 1993).

An Iowa school employee injured his back in a work-related fall. He sought an extension to the two-year time limit on a claim for compensation. The court held that the discovery rule, which would have allowed for a late claim, was not applicable where the worker knew of the injury at the time of the fall and of the employer's responsibility.[95]

A Pennsylvania school custodian was unable to provide unequivocal medical evidence of a causal relationship between her work and an injury to her back. The failure of the referee to rule on the submission of evidence that the employee was aged, obese, depressed, and female was held harmless. There was nothing to indicate that factors of age, obesity, or sex were relied on in the referee's decision.[96]

An Alaska school district's continuing treatment guidelines were upheld in a case where treatment had been denied to a worker. The injured teacher's assistant had failed to timely submit the appropriate treatment plan.[97]

An injured Florida substitute bus driver appealed the manner in which his average weekly wage was calculated. The court recognized that his employment did not fit neatly into any of the statutory alternatives. However, basing his wage on the previous thirteen weeks, rather than the four weeks in which he had actually worked, was found appropriate.[98]

Similarly, in a Massachusetts case, a teacher's summer vacation period was not determined to be time lost in that the teacher could have worked. Therefore, in calculating the amount of weekly workers' compensation benefits, the court found it proper to calculate the average weekly wages by dividing by the total number of weeks.[99]

Although a Connecticut school custodian had been awarded workers' compensation benefits, he brought a personal injury action for the injuries sustained when he was thrown from and run over by a tractor driven by another custodian. The court held that the tractor was excluded from the statutory definition of a "motor vehicle" for the purpose of a motor vehicle exception to the exclusive remedy provision of the workers' compensation law.[100]

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[94] Lee v. East Baton Rouge Parish Sch. Bd., 623 So. 2d 150 (La. Ct. App. 1993). For a similar case *see* Zion-Benton Township High Sch. Dist. 126 v. Industrial Comm'n, 609 N.E.2d 974 (Ill. App. Ct. 1993).

[95] Nielsen v. Fremont-Mills Community Sch., 506 N.W.2d 173 (Iowa Ct. App. 1993).

[96] Bennett v. Workmen's Compensation Appeal Bd. (Fort LeBeouf Sch. Dist.), 629 A.2d 208 (Pa. Commw. Ct. 1993).

[97] Anchorage Sch. Dist. v. Hale, 857 P.2d 1186 (Alaska 1993).

[98] Waldorf v. Jefferson County Sch. Bd., 622 So. 2d 515 (Fla. Dist. Ct. App. 1993). *See* Lynch v. U.S.D. No. 480, 850 P.2d 271 (Kan. Ct. App. 1993) (where a claimant's weekly wage was calculated by dividing total compensation by 42.71 weeks); Brounette v. East Baton Rouge Parish, 610 So. 2d 979 (La. Ct. App. 1992) (where a teacher's aide's benefits were correctly computed).

[99] Herbst's Case, 624 N.E.2d 564 (Mass. 1993).

An Oregon bus driver sought compensation for a back injury and for depression. She was unable to establish that the back injury was work related. Since she claimed her depression was a result of the back injury, she could not recover for depression based on an uncompensable injury.[101]

A Michigan school secretary was unable to secure benefits for emotional injuries she sustained allegedly as the result of her misconception that her principal was distancing himself from her. The events which bothered her were seen as relatively innocuous and would not have bothered a reasonable employee.[102]

Also in Michigan, an art teacher sought compensation for an alleged mental disability. He was unable to establish actual work-related events which would sustain a claim. Under the applicable objective standard, the court held that even if the stresses resulted in hypersensitive or idiosyncratic reactions by the claimant, he was not entitled to benefits.[103]

A Florida teacher was unable to prove that the cerebral hemorrhage he suffered arose out of his employment. The fact that he was involved in a stressful situation with an unruly student at the time of the hemorrhage was not sufficient. Specifically, the court pointed to the absence of evidence of physical touching or physical over-exertion.[104]

Assault and Battery

An Alabama middle school student claimed a teacher/coach conspired to commit assault in an incident that involved a teacher allegedly striking her with a stick in the coach's presence. The court found in favor of the coach finding no evidence that he had the authority to instruct the teacher not to punish the student. At most, he failed to override the teacher's already informed intention of punishing the student.[105]

An Ohio teacher was charged with sexual battery as a result of his alleged consensual sexual conduct with a student over the age of sixteen.

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[100] Pinheiro v. Board of Educ. of W. Hartford, 620 A.2d 159 (Conn. Ct. App. 1993).

[101] Damm v. Washington County Sch. Dist. #7, 846 P.2d 425 (Or. Ct. App. 1993). *See* Guggenheim v. Parish of Jefferson, 613 So. 2d 636 (La. Ct. App. 1992). A cafeteria worker was unable to link her disability to a work-related accident.

[102] Bach v. Flint Bd. of Educ., 494 N.W.2d 815 (Mich. Ct. App. 1992).

[103] Boyle v. Detroit Bd. of Educ., 494 N.W.2d 818 (Mich. Ct. App. 1992). *See* Gardner v. Van Buren Pub. Schs., 494 N.W.2d 845 (Mich. Ct. App. 1992). The claimant failed to secure benefits for mental disability allegedly related to his employment.

[104] Zundell v. Dade County Sch. Bd., 609 So. 2d 1367 (Fla. Dist. Ct. App. 1992).

[105] Deal *ex rel.* Barber v. Hill, 619 So. 2d 1347 (Ala. 1993).

The prosecution was unable to show that the teacher stood, by statutory definition, in loco parentis with the student. The court pointed out that while the teacher's act may be seen as wrong in the eyes of his profession and the eyes of society, it was not considered criminal by the State of Ohio.[106]

Defamation/Invasion of Privacy

A former Pennsylvania administrator brought an unsuccessful action against school districts and superintendents in which he alleged that defamatory statements were made to prospective employers. On appeal, the court agreed that school districts are immune from suit. However, the summary judgment for the administrators was reversed as factual questions were found remaining as to whether the superintendents made their statements outside the scope of their employment. If their wrongful conduct was determined to have fallen within the scope of their employment, then it would be necessary to determine if it constituted willful misconduct.[107]

Parents whose children attended a Minnesota elementary school wrote a letter to the superintendent and school board critical of the school's principal. At issue was whether the principal was a public official and therefore unable to recover for defamation absent a showing of malice. The court held that the principal was a government employee who exercised significant authority in the performance of governmental duties. Thus, when criticized for official conduct the principal was a public official for the purpose of defamation law.[108]

A Florida school bus driver brought a defamation suit against a television station and reporter. The court found against the driver as the broadcast statement that the driver had served four years in jail for attempted murder was a fair republication of the facts. The driver had not established invasion of privacy from the broadcast of an allegedly private name change, in light of the public record of the driver's divorce and criminal record. Finally, it was a matter of public concern that many bus drivers had criminal records and that the driver had served time in jail.[109]

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106. State v. Noggle, 615 N.E.2d 1040 (Ohio 1993).

107. Petula v. Meilody, 631 A.2d 762 (Pa. Commw. Ct. 1993).

108. Johnson v. Robbinsdale Indep. Sch. Dist. No. 281, 827 F. Supp. 1439 (D. Minn. 1993).

109. Woodard v. Sunbeam Television Corp., 616 So. 2d 501 (Fla. Dist. Ct. App. 1993).

Product Liability

A Missouri school district brought an action against an asbestos manufacturer. The manufacturer claimed it could not be held responsible for liabilities of its corporate predecessor. The court agreed that the manufacturer could not be held responsible for the 1957 installation of products which it did not begin to manufacture until 1963.[110]

A Minnesota school district brought an action against the manufacturer of asbestos-containing fire-proofing materials used in the construction of several buildings. The manufacturer sought reversal of a decision for the school district. The court held that the economic loss doctrine does not bar the owner of a building from the costs of removal and replacement of a product which is highly dangerous to humans.[111]

Over one hundred students and adults who drank pesticide tainted water at a California public school over a nineteen year period filed a toxic-tort action against the pesticide's manufacturer. The court held that the manufacturer responsible for future medical monitoring as there was evidence showing the likelihood of after effects.[112]

A North Dakota school district successfully sued to recover costs of removing asbestos-containing plaster used to coat school ceilings. On appeal, that decision was reversed and the case remanded for a new trial. The court held that the school district's nuisance claim was improperly submitted to the jury. Because the manufacturer of the plaster did not have control of the building contaminated by asbestos, the state's nuisance law did not afford a remedy against that manufacturer.[113]

Intentional Infliction of Emotional Distress

A New Jersey teacher brought an action against a principal and board of education alleging sexual harassment. Summary judgment was granted dismissing three of four counts. The teacher's appeal resulted in a reversal of the dismissals. The court found issues of fact as to whether the principal acted with the required intent in allegedly harassing the teacher and whether the school board was negligent. Also, there was no reason to require physical injury before permitting the victim to seek damages for the intentional infliction of emotional distress.[114]

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[110] East Prairie R-2 Sch. Dist. v. United States Gypsum Co., 813 F.Supp. 1396 (E.D. Mo. 1993).

[111] Independent Sch. Dist. No. 622 v. Keene Corp., 495 N.W.2d 244 (Minn. Ct. App. 1993).

[112] Miranda v. Shell Oil Co., 15 Cal. Rptr.2d 569 (Cal. Ct. App. 1993).

[113] Tioga Pub. Sch. Dist. #15 of Williams County, N.D. v. United States Gypsum Co., 984 F.2d 915 (8th Cir. 1993).

[114] Wilson v. Parisi, 633 A.2d 113 (N.J. Super. Ct. App. Div. 1993).

A former employee of a Georgia school district brought an action against her former transportation supervisor and another employee alleging intentional infliction of emotional distress. The court held the conduct of her co-worker to be tasteless and rude social conduct which did not rise to the level necessary to inflict emotional distress.[115]

Constitutional Torts

Student Initiated Cases

A section 1983 action was brought by a former Pennsylvania middle school student alleging sexual, physical, and verbal abuse by his teacher. The court failed to grant a summary judgment to the school district. The allegations adequately accused the defendants of adopting a practice of deliberate indifference to the student's constitutional rights by unreasonably dealing with the teacher's conduct. However, the district could not be held responsible for injuries the student allegedly incurred during a two and one-half year sexual relation which occurred after the student graduated from middle school.[116]

An Illinois student who was allegedly sexually abused by a teacher, filed a civil rights action against members of the school board, school district, school administrators, and school counselors. The court held that the student failed to state a claim under the Fourteenth Amendment for a denial of a liberty interest. Likewise, she was unable to state a claim against the counselors for failure to report the abuse. However, the student was able to support a claim as a result of the actions of the school administrators. There were numerous allegations of sexual abuse between the teacher and other female students before and during the time the plaintiff was abused. Furthermore, it was alleged that the administrators concealed knowledge of the teacher's past sexual conduct, and the existence of the reported act from another victim and her mother. As a result, the plaintiff supported a claim that the school administrators promoted school policies that encouraged a climate in which innocent children were victimized.[117]

An eighth grade Virginia student was threatened with sexual assault by a classmate who three days later actually assaulted her. The threat was issued during class and was reported to the teacher by the student. Although the teacher made another teacher aware of the threat, it was alleged that the teachers failed to take any action to discipline the stu-

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115. Hendrix v. Phillips, 428 S.E.2d 91 (Ga. Ct. App. 1993).
116. K.L. v. Southeast Delco Sch. Dist., 828 F. Supp. 1192 (E.D. Pa. 1993).
117. Doe v. Board of Educ. of Hononegah Community High Sch. Dist. #207, 833 F. Supp. 1366 (N.D. Ill. 1993).

dent or prevent him from actually accomplishing the assault. The section 1983 action against the teachers and school board arose from their failure to protect her from attack. The counts alleging a deprivation of the student's liberty interests were dismissed. The court held that even if public schools have some duty under state law to protect students, that did not place an affirmative burden of the Fourteenth Amendment due process clause upon the teachers and administrators. The court explained that there must be an underlying constitutional deprivation before section 1983 liability may attach. However, regarding the liability of the teachers, it was deemed a matter for trial whether they were grossly negligent.[118]

A junior high school student alleged that her California school district, guidance counselor, and principal failed to end sexual harassment inflicted on her by fellow classmates. The court found that while title IX does prohibit hostile environment sexual harassment, to obtain damages it is necessary to prove intentional discrimination on the basis of sex by an employee of the educational institution. The section 1983 claim against the school districts was dismissed with prejudice as the school officials could not be sued in their official capacities. The motion to dismiss the claim against the school official was denied because he could be sued in his individual capacity arising from his official acts.[119]

A high school student who was sexually assaulted by her teacher was unsuccessful in her section 1983 action against a Kansas school board and principal. The court found no affirmative link to causally connect either the school district or the principal to the sexual abuse. While there may have been negligence on the part of the defendants to adequately investigate rumors of inappropriate conduct by the teacher, under section 1983 there must have been a deliberate deprivation of constitutional rights. A supervisor must have shown deliberate indifference rather than mere negligence.[120]

Parents of a fourth grade Colorado student brought a section 1983 action against the school board following the sexual molestation of the student by her teacher. Neither the principal nor the superintendent were named in the action. Finding for the board, the court said that it was uncontroverted that the school board did not engage in any affirmative acts, nor did it tolerate, condone, or encourage any such acts of abuse. Since it had no notice of the allegations against the teacher until after he was suspended from his position, the court upheld the summary judgment granted the school board.[121]

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[118] B.M.H. *ex rel.* C.B. v. School Bd. of Chesapeake, Va., 833 F. Supp. 560 (E.D. Va. 1993).

[119] Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560 (N.D. Cal. 1993).

[120] Gates v. Unified Sch. Dist. No. 449 of Leavenworth County, Kan., 996 F.2d 1035 (10th Cir. 1993).

Children who were allegedly sexually molested by their school bus driver brought a section 1983 action against the driver, bus company, its president, and the Pennsylvania school superintendent. The court provided summary judgment in favor of the driver, bus company, and president as they were not determined to have been acting under the color of state law by providing transportation for students to and from school. Regarding the superintendent, judgment in his favor was also appropriate as there was no evidence that he had acted with deliberate indifference, or had maintained a policy that directly caused constitutional harm. He had actively responded to a similar complaint several years before, and in the present case was found to have acted in a prompt and efficient manner. Finally, the court rejected a comparison between compulsory school attendance and the incarceration of individuals, and thus found no special relationship between the students and the superintendent which would give him an affirmative duty to protect them from acts of private violence.[122]

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[121] Jones v. Board of Educ. of Sch. Dist. 50, Archuleta & Hinsdale Counties, 854 P.2d 1386 (Colo. Ct. App. 1993).

[122] Black *ex rel.* Black v. Indiana Area Sch. Dist., 985 F.2d 707 (3d Cir. 1993).

6

SPORTS

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Introduction

This Chapter includes all cases, at either the K-12 or higher education levels, which deal with student-athletes, coaches, athletic directors, athletic facilities, athletic associations, and booster organizations. However, no case law is discussed which pertains to physical education instruction.

Eligibility

This section contains eight cases: one case dealt with the issue of longevity; one case involved a challenge to an age rule; three cases addressed transfer rules; one case discussed drug testing for athletes; one case related to a state statute which mandated due process standards for the NCAA; and one case contested NCAA restrictions on student-athletes entering professional sport drafts.

Longevity

A high school basketball player in Indiana sought to enjoin the high school athletic association from implementing a decision rendering him ineligible for competition due to the "eight semester rule" (i.e., no one may participate in interscholastic athletics after enrolling for eight semesters of high school). The student had previously attended another school where he was not an athlete and where he had received no academic credit for his third year of high school because of poor attendance. After transferring, the student played one year of basketball at the new school before being faced with the "eight semester rule" during his senior year.

The district court, in analyzing the student's equal protection claim, concluded that Indiana law requires not only that the rule meet the rational basis test but that the rule must also be scrutinized for "overbreadth." On this latter point the court held that the rule swept too broadly because the plaintiff did not "redshirt" nor did he move to a new school because of the prospect of athletic competition. Therefore, the court ordered a permanent injunction against the defendant to allow the plaintiff to play basketball.[1]

Age

Learning disabled high school athletes in Texas sought to enjoin the state interscholastic league from enforcing a rule precluding participation by athletes who exceeded nineteen years of age. The Texas Court of Appeals affirmed the district court's holding which had granted the injunction. The athletes were "disabled" under section 504 of the Rehabilitation Act and had not received reasonable accommodation by the league which allowed no exceptions to the age rule.[2]

Transfer

A high school student who transferred from a private school to a public school for financial reasons requested the superintendent to sign a waiver form certifying that the student's transfer was for reasons unrelated to athletic recruitment or participation in order that he could be eligible to play basketball. The superintendent refused to do so on the basis that this student's participation would be unfair to other students who had tried out for the team and been cut. The student, therefore, brought an Article 78 mandamus action to compel the superintendent to sign the needed document. The New York Supreme Court dismissed the petition because the student had failed to exhaust his available administrative remedy of appeal to the school board.[3]

A district court in Missouri held that a transfer rule which provided that a student who transfers from a public school to a nonpublic school may not participate in athletics for one year thereafter violated the equal protection clause. The restriction on eligibility for those who transferred from a nonpublic school to a public school was only five days. The defendant could not show that the transfer restriction promoted a legitimate state interest in view of the fact that there was no evidence of unfair recruitment by the private school.[4]

The parents of a handicapped student sought a preliminary injunction under the Education of the Handicapped Act (EHA) restraining the secondary school athletic association from applying a transfer rule. The student had transferred from a parochial school to a public high school and had been found, after the transfer, to have a learning disability. The Sixth Circuit Court of Appeals dismissed the suit because the parents

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1. Jordan v. Indiana High Sch. Athletic Ass'n, 813 F. Supp. 1372 (N.D. Ind. 1993).
2. University Interscholastic League v. Buchanan, 848 S.W.2d 298 (Tex. Ct. App. 1993).
3. Sutterby v. Zimar, 594 N.Y.S.2d 607 (N.Y. Sup. Ct. 1993).
4. Beck v. Missouri State High Sch. Activities Ass'n, 837 F. Supp. 998 (E.D. Mo. 1993).

had not exhausted all available administrative remedies for resolving disputes about a handicapped child's educational program.[5] After a return to the district court,[6] the Sixth Circuit has now ruled that the student was not entitled to general damages under the EHA and therefore did not state a claim under section 1983.[7]

Drug Testing

A Colorado appellate court held that a university's mandatory drug testing program for student-athletes was an "unreasonable search" under the Fourth Amendment. The interest in having drug-free athletes did not rise to the level of a compelling state interest which justified the intrusion into privacy at issue here.[8] The Colorado Supreme Court affirmed, holding that the drug testing in this case violated the Fourth Amendment and a provision of the Colorado Constitution.[9]

Statutory Due Process

In the wake of considerable scrutiny of the enforcement procedures of the NCAA, a number of states, including Nevada, passed statutes requiring the NCAA to meet certain rigorous standards when it investigated universities within the borders of the state. In this case, the NCAA sought injunctive and declaratory relief from the Nevada due process statute which had been enacted into law in April 1991. The NCAA argued that the statute violated the commerce clause of the United States Constitution and impaired contractual rights between the NCAA and its members in violation of the contract clause of the Constitution.

The federal district court held that the statute imposed an excessive burden on interstate commerce because it prevented the uniform enforcement of NCAA regulations across the nation which effectively invalidated the NCAA's system of internal governance and enforcement. The statute also violated the contract clause. The statute was, therefore, held invalid and unenforceable against the NCAA.[10] The Ninth Circuit Court of Appeals affirmed; however, it held that the statute was a per se violation of the commerce clause and the balancing test done by the district court was unnecessary in this case. After finding a violation of the commerce clause, the court declined to consider the contract clause issue.[11]

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[5] *See* THE YEARBOOK OF EDUCATION LAW 1990 at 158, Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 873 F.2d 933 (6th Cir. 1989).

[6] *See* THE YEARBOOK OF EDUCATION LAW 1991 at 155, 735 F. Supp. 753 (M.D. Tenn. 1990).

[7] Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 980 F.2d 382 (6th Cir. 1992).

[8] *See* THE YEARBOOK OF EDUCATION LAW 1993 at 144, Derdeyn v. University of Colo., 832 P.2d 1031 (Colo. Ct. App. 1991).

[9] University of Colo. v. Derdeyn, 863 P.2d 929 (Colo. 1993).

[10] *See* THE YEARBOOK OF EDUCATION LAW 1993 at 144, National Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476 (D. Nev. 1992).

Draft Rules

In a case first heard in a federal district court in Indiana, a former football player for Notre Dame alleged that the NCAA rule which provides that student-athletes who enter the National Football League draft are subsequently ineligible for collegiate football violates section 1 of the Sherman Antitrust Act. The plaintiff also challenged the NCAA rule which forbids student-athletes to retain player agents. The court refused to grant the plaintiff a preliminary injunction as it held that under a rule of reason analysis, the procompetitive and anticompetitive effects of an alleged restraint of trade must be discussed. Since the rules in question have substantial procompetitive effects in that they advance the goals of focusing athletes' attention on college endeavors and promote the integrity and quality of college football, the plaintiff could not demonstrate the necessary likelihood of success on his claim to warrant an injunction.[12]

The Seventh Circuit affirmed because the plaintiff did not allege the anticompetitive effects on a discernible market. The plaintiff did not explain how the no-draft rule restrained trade in the college football labor market and was therefore unable to state a claim upon which relief could be granted.[13]

Equality of Programs

General

Former members of a club ice hockey team for women sued under title IX when the university refused to grant the team varsity status. The federal district court held that this refusal violated title IX since the university's reasons why the team should not have varsity status were pretextual. The real reason for not granting varsity status was the expense of doing so, which is not a sufficient reason to justify gender discrimination.[14] The Second Circuit vacated the district court's decision and remanded it for dismissal as moot. None of the named plaintiffs could benefit from the relief ordered by the district court because they would have all graduated by that time. Since the matter was not filed as a class action, the action was held to be moot.[15]

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[11] National Collegiate Athletic Ass'n v. Miller, 10 F.3d 633 (9th Cir. 1993).

[12] *See* The Yearbook of Education Law 1992 at 144, Banks v. National Collegiate Athletic Ass'n, 746 F. Supp. 850 (N.D. Ind. 1990).

[13] Banks v. National Collegiate Athletic Ass'n, 977 F.2d 1081 (7th Cir. 1992).

[14] *See* The Yearbook of Education Law 1993 at 145, Cook v. Colgate Univ., 802 F. Supp. 737 (N.D.N.Y. 1992).

The remaining cases in this area were all precipitated by financial concerns which caused universities to either cut teams completely or demote teams to club status from varsity status. All of the decisions, which used title IX analysis, were favorable to female athletes.

In a class action brought to protest the demotion of the women's gymnastics and volleyball teams from varsity status to club sports, the district court issued a preliminary injunction restoring the teams to varsity status.[16] In affirming, the First Circuit Court of Appeals noted that the university, in slashing both men's and women's sports, "overlooked the shortcomings that plagued its program before it took blade in hand." The defendant must fully and effectively accommodate the underrepresented gender's interests and abilities, even if that means giving female athletes a "larger slice" of a shrinking athletic opportunity pie.[17]

A district court in Colorado decided a title IX case after a state university discontinued the women's fast pitch softball team. A preliminary injunction was issued reinstating the team.[18] The Tenth Circuit affirmed the reinstatement of the team but found that the district court exceeded its authority in ordering that the team play a fall exhibition season. Also, the court noted that no proof of discriminatory intent need be shown to prevail in a title IX action.[19]

In a suit brought against a Pennsylvania university, the defendant cut the men's soccer and tennis teams as well as the women's field hockey and gymnastics teams due to financial constraints. The district court ordered the reinstatement of the two women's teams as it found a title IX violation in its failure to provide female students with proportionate opportunities to participate in intercollegiate athletics.[20] The Third Circuit affirmed and held that the district court did not abuse its discretion in refusing to modify its injunction so that defendant university could replace gymnastics with soccer.[21]

The last two cases were brought by male plaintiffs who protested the elimination of men's sports under title IX and equal protection principles. The University of Illinois eliminated its men's swim team without eliminating a women's sport. The district court held that the elimination of only a men's team did not violate title IX because men's participation in athletics was more than substantially proportionate to enrollment whereas the women's participation was not. Therefore, the men's interests and abilities were presumptively met when substantial proportionality was achieved. The plaintiffs' equal protection argument also failed because the classification served a compensatory remedial purpose of eradicating past discrimination.[22]

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[15] Cook v. Colgate Univ., 992 F.2d 17 (2d Cir. 1993).
[16] Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992).
[17] Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993).
[18] Roberts v. Colorado State Univ., 814 F. Supp. 1507 (D. Colo. 1993).
[19] Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993).
[20] Favia v. Indiana Univ. of Pa., 812 F. Supp. 578 (W.D. Pa. 1993).
[21] Favia v. Indiana Univ. of Pa., 7 F.3d 332 (3d Cir. 1993).

Finally, male plaintiffs brought a title IX and equal protection case against a university which dropped the men's varsity wrestling program. The district court in Iowa held that the plaintiffs were not entitled to a preliminary injunction since they failed to show irreparable harm and failed to establish that they were likely to prevail on the merits of the claim.[23]

Boy to Play on Girls' Team

In a field hockey case from Pennsylvania, a school district's rule that prohibited males from participating on the girls' field hockey team, which was designated as a "girls only" team, was challenged. The court granted summary judgment for the plaintiff as it reasoned that the exclusion violated title IX since field hockey is not a contact sport and since boys had limited opportunities for the last eighteen years at this school females were not forbidden from trying out for any team, whereas males could not participate in the ten sports designated exclusively for female participation.[24]

The Third Circuit Court of Appeals reversed and remanded. Summary judgment for the plaintiff was erroneous because the question of whether field hockey was a contact sport was a fact question, not a matter of law as held by the district court. Furthermore, on the issue of previously limited athletic opportunities, the mere opportunity to try out for a team is not determinative. Athletic opportunities must mean "real" ones not illusory ones.[25]

Tort

In 1993 there were forty-five tort cases dealing with sport. Of these, five were intentional torts. Of the negligence cases, thirty-three dealt with participants and six cases concerned spectators. One case related to the law of bailment.

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[22] Kelley v. Board of Trustees of the Univ. of Ill., 832 F. Supp. 237 (C.D. Ill. 1993).

[23] Gonyo v. Drake Univ., 837 F. Supp. 989 (S.D. Iowa 1993).

[24] See THE YEARBOOK OF EDUCATION LAW 1993 at 146, Williams v. School Dist. of Bethlehem, Pa., 799 F. Supp. 513 (E.D. Pa. 1992).

[25] Williams v. School Dist. of Bethlehem, Pa., 998 F.2d 168 (3d Cir. 1993).

Intentional

Assault and Battery. An announcer for a high school basketball game engaged in an altercation with a spectator shortly before the end of the game. The plaintiff tried to intervene and was knocked unconscious by the announcer. The issue before the Utah Supreme Court was whether the board of education was entitled to immunity under the statute which gives immunity if the claim arises from an intentional tort. The plaintiff tried to circumvent this provision by arguing that it was the negligent acts of the board of education in hiring and retaining the announcer which were in question. Immunity was preserved for the board since the injury arose from the assault and battery.[26]

A referee was assaulted by the father of a boy who had lost a wrestling match. In regard to the plaintiff's claims against the school district, the New York appellate court held that the board was immune from suit because the plaintiff did not establish a "special relationship" on the part of the board to protect the referee.[27]

In a corporal punishment situation, a middle school student alleged that a coach was in a conspiracy with another teacher to commit assault. The student was paddled by the teacher in the presence of the coach. Summary judgment for the coach was affirmed by the Alabama Supreme Court as it held that the coach was not the teacher's supervisor and there was no evidence to show that he had the authority to instruct her not to punish the student.[28]

A basketball coach allegedly raped a student and the school board filed a declaratory action regarding whether its liability policy provided coverage. The appellate court in North Carolina held that the insurer had no duty to defend the coach but that the policy did cover the board regarding the allegations of negligent supervision and negligent hiring which were raised in the suit.[29]

Defamation. The plaintiff, who was a high school athletic director, football coach, and teacher, sued for defamation after an article appeared in a newspaper about problems in the football program including a fight with opponents after a game. The reporter did not attend the game in question nor did he discuss the events with the plaintiff. He based his article on conversations with the parents of the opposing team's players who were hurt in the fight and the rival coach. The article accused the plaintiff of turning his back on wrongdoing in his program and of being slow to correct problems.

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[26] Petersen v. Board of Educ. of Davis County Sch. Dist., 855 P.2d 241 (Utah 1993).

[27] Perry v. Board of Educ. Gouverneur Cent. Sch. Dist., 592 N.Y.S.2d 493 (N.Y. App. Div. 1993).

[28] Deal *ex. rel.* Barber v. Hill, 619 So. 2d 1347 (Ala. 1993).

[29] Durham City Bd. of Educ. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 426 S.E.2d 451 (N.C. Ct. App. 1993).

The trial court granted the defendant's motion for summary judgment. On appeal the Texas Court of Appeals held that the plaintiff was a "public official" who must show actual malice to prevail. Furthermore, the mere failure by the reporter to inquire more fully into the accuracy of the statements in the article did not show actual malice. Summary judgment was affirmed.[30]

Negligence

Participants. There were three cases dealing with procedural issues: one case dealt with the question of jurisdiction and two cases discussed the allowance of late notice of claims. In an Illinois case a student was injured in an intramural ice hockey match as another student "checked" him into the sideboard. The plaintiff became a quadriplegic and he filed a complaint in an Illinois Circuit Court alleging willful and wanton misconduct by the university in its failure (1) to properly train and supervise and (2) to warn of risks in the game. The Circuit Court dismissed the complaint for a lack of subject matter jurisdiction. The Illinois Appellate Court affirmed on the basis that the language of the Court of Claims Act is clear that "all tort claims" are within the exclusive jurisdiction of the Court of Claims.[31]

In New York a child fell from a slide on the elementary school playground. The appellate court allowed the notice of claim to be served late because the school district was notified of the accident within two days of its occurrence and the slide was in the same condition at the site as when the accident occurred.[32]

Likewise, in another injury on a New York school playground, a notice of claim which was one month late was allowed. The incident was reported the day after the accident by the school nurse and reviewed by the principal. In view of this actual notice the district could not show it was substantially prejudiced by this brief delay.[33]

There were eleven cases dealing with various aspects of immunity. The first two cases discussed the real estate exception to immunity and a third case looked at the related question of the public building exception to immunity.

In a Pennsylvania case the real estate exception to sovereign immunity was applicable in a situation where a child was injured on a school district's playground. A defective merry-go-round resulted in the child's broken leg. Since the merry-go-round was affixed to real property and it contained a defect, the school district was not immune from suit.[34]

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[30] Johnson v. Southwestern Newspapers Corp., 855 S.W.2d 182 (Tex. Ct. App. 1993).
[31] Rembis v. Board of Trustees of Univ. of Ill., 618 N.E.2d 797 (Ill. App. Ct. 1993).
[32] Andersen v. Brewster Cent. Sch. Dist., 593 N.Y.S.2d 91 (N.Y. App. Div. 1993).
[33] Tortorici v. East Rockaway Pub. Sch. Dist. No.19, 594 N.Y.S.2d 335 (N.Y. App. Div. 1993).

In another Pennsylvania case, a minor drowned in a school district swimming pool while the pool was being operated by the township. The plaintiffs sued both the school district and the township and the trial court entered summary judgment for the township. On appeal, the court held that the township's limited use of the pool under its contract with the school district did not give it "possession" of the pool for purposes of the real estate exception to immunity. Therefore, the township was immune from suit.[35]

A student at a community college in Michigan was injured while performing a gymnastic exercise on the uneven parallel bars. A bolt that held the bars in place fractured. In the suit against the college, the trial court granted summary judgment for defendant holding that the public building exception to immunity was inapplicable. The Michigan appellate court affirmed since the bars were not "fixtures" because they were only temporarily affixed to the realty by a screw anchor.[36]

In Minnesota, a seven-year-old child on a school field trip drowned in a swimming pond built and maintained by the county. A jury award of over $1 million was rendered against the school district and the county. On appeal, the judgment against the school district for negligent supervision was affirmed. However, this court held the county immune because of the tort claims act provision which grants limited immunity to state agencies unless the state engages in conduct which would entitle a trespasser to damages against a private person. Based on that language, the court held that the pond was not an artificial condition which necessitated a duty to warn a trespasser.[37]

In another field trip incident a handicapped student was injured at a state park in a fall from a foot bridge. The special education district and teachers were sued on the basis of negligent supervision. Two immunity provisions were discussed by the Illinois appellate court. The first immunity provision, which confers immunity upon a public entity for negligent supervision, was not applicable because the injury did not occur on "public property" as defined under the act. However, the teachers were acting in loco parentis as they supervised, regardless of whether the activity was held on school grounds; therefore, the teachers had immunity for ordinary negligence.[38]

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[34] Norwin Sch. Dist. v. Cortazzo, 625 A.2d 183 (Pa. Commw. Ct. 1993).

[35] Sims v. Silver Springs-Martin Luther Sch., 625 A.2d 1297 (Pa. Commw. Ct. 1993).

[36] Carmack v. Macomb County Community College, 502 N.W.2d 746 (Mich. Ct. App. 1993).

[37] Johnson v. Washington County, 506 N.W.2d 632 (Minn. Ct. App. 1993).

[38] Stiff v. Eastern Ill. Area of Special Educ., 621 N.E.2d 218 (Ill. App. Ct. 1993).

Three more cases focused on immunity related to real property issues. In Oklahoma, a five-year-old child fell from a playground slide on school property during summer recess. The court held that the school district was immune from claims asserting a failure to inspect an attractive nuisance. Furthermore, there was no duty to warn of a risk of falling from the slide since that is a risk which a child regularly encounters.[39] The second case involved a contractor's employee who fell on uneven concrete in a school playground while performing masonry repairs. The Illinois appellate court held that the board of education had immunity for a cause of action based on the condition of the school playground even though the injured party entered the property to make repairs and not for recreational purposes. In contrast to the Recreational Use Statute, the immunity here arose from the character of the property not from the actual or intended use of the property.[40]

In 1991, the Illinois appellate court declined to fashion a new exception to immunity based on "premises liability." Two fields were placed end to end and were often simultaneously used for physical education classes, intramurals, or athletic events. A nine-year-old student sustained a skull fracture as he sat in the end zone of one of the fields watching an intramural game. An older student ran into him as he caught a football in the adjacent end zone and ran through it into the end zone in which the nine year old was sitting. The plaintiff alleged negligence in the design of the fields. However, although Illinois law, at that time, provided an exception to immunity for defective equipment, the appellate court decided that it would be inappropriate to extend this exception to premises liability questions.[41]

However, Illinois law has now changed and the Illinois Supreme Court vacated the above decision and remanded it to the appellate court for further proceedings. The appellate court has permitted the plaintiff to proceed with the case based on allegations of landowner negligence. Immunity is not applicable to allegations of negligence based on the school district's responsibility as property owner independent of the negligent acts of any teacher.[42]

The New Mexico Supreme Court addressed the question of whether a swimming pool owned and operated by a school district was an "inherently dangerous activity" giving rise to strict liability from which the school district enjoys sovereign immunity. In this case a disabled boy scout drowned at an aquatic camp held at the school district's pool. The scout could not swim and had a history of multiple seizure disorder. The

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39. Brewer v. Independent Sch. Dist. No. 1, 848 P.2d 566 (Okla. 1993).
40. Hanover Ins. Co. v. Board of Educ. of Chicago, 608 N.E.2d 183 (Ill. App. Ct. 1992).
41. *See* THE YEARBOOK OF EDUCATION LAW 1992 at 149, Ward v. Community Unit Sch. Dist. No.220, 572 N.E.2d 986 (Ill. App. Ct. 1991).
42. Ward v. Community Unit Sch. Dist. No.220, 614 N.E.2d 102 (Ill. App. Ct. 1993).

doctrine of an "inherently dangerous activity" is not applicable here because it refers to the creation or maintenance of a condition that is universally dangerous, not one that gives rise to a high risk of harm because of special circumstances (e.g., a person with a disability who cannot swim using the pool).[43]

A Massachusetts appellate court dealt with the issue of discretionary decisions as applied to a schoolyard and athletic field. A high school freshman sitting in the schoolyard was hit in the eye by a lacrosse ball which came into the yard from an adjacent athletic field. Lacrosse balls were thrown into this gathering area "fairly often." The court held that the decision not to erect a fence between the field and the schoolyard was a discretionary one which is given immunity. However, the failure to warn of the hazard in question was not a policy decision entitled to immunity.[44]

In Ohio, a high school drum major attempted to light a fire baton but ignited gasoline which had spilled on the ground, injuring a majorette for the visiting team. The trial court granted summary judgment for the band director, drum major, and school board on the basis of immunity. The Ohio appellate court reversed, finding that there was a fact question for the jury as to whether the band director acted in a "wanton or reckless" manner which would be an exception to immunity.[45]

There were five cases that dealt with the applicability of recreational use statutes. In Kentucky, a neighborhood youth was injured while playing basketball on a private high school's playground. The youth had his back broken when the free-standing goal came down on him. The goal had fallen many times before because the concrete at the base, which was used as a counterweight, was removed by players so they could dunk more easily. The lower court granted summary judgment for the high school under the recreational use statute. The appellate court reversed finding that there was a question of fact whether the landowner willfully or maliciously failed to guard or warn of a dangerous condition, which would eliminate the protection of the recreational use statute for the defendant.[46]

In New York, the recreational use statute was applicable to sledding conducted on the school property. A five-year-old on a small plastic sled collided with a handrailing adjacent to the school building.[47]

The Connecticut Supreme Court addressed the statutory language of "available to the public" in deciding a case in which a plaintiff was hurt playing American Legion baseball on a field owned by the town and controlled by the board of education. The court decided that the defendants were entitled to immunity under the recreational use statute because the field was "available to the public" even though it was not available to the general public when school was in session. The restriction on use of the fields did not vitiate its availability to the public for purposes of the statute. Also a league baseball game is a recreational purpose under the statute.[48]

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[43] Seal v. Carlsbad Indep. Sch. Dist., 860 P.2d 743 (N.M. 1993).
[44] Alter v. City of Newton, 617 N.E.2d 656 (Mass. App. Ct. 1993).
[45] Minnick v. Springfield Local Sch. Bd. of Educ., 611 N.E.2d 926 (Ohio Ct. App. 1992).
[46] Huddleston *ex rel.* Lynch v. Hughes, 843 S.W.2d 901 (Ky. Ct. App. 1992).
[47] McGregor v. Middletown Sch. Dist. No. 1, 593 N.Y.S.2d 609 (N.Y. App. Div. 1993).

A seventeen-year-old high school student fell playing basketball on a school's outdoor court. The plaintiff alleged willful and wanton conduct in the school board's failure to repair the court which allegedly had clearly visible trenches. If willful and wanton conduct can be established then the defendant is not immune under the recreation use statute. The Illinois Appellate Court affirmed the dismissal of the action as it found that the facts alleged by the plaintiff did not rise to the level of willful and wanton conduct necessary as defined by this statute.[49]

The final case in this area also dealt with whether the defendant school board had willfully failed to guard or warn of the dangerous condition of a merry-go-round in disrepair on its property. The recreational property act was held applicable because "willful" means that there is actual knowledge of a dangerous condition not apparent to those using the playground. Here, the defective condition of the equipment was known and appreciated by the father of the injured child.[50]

Four cases resolved disputes by finding "no duty" on the part of the defendant(s). First, in a Louisiana case, an eighth grader had his leg fractured by another eighth grader in a scrimmage football game. The injured student weighed 110 pounds whereas the student who fell on him weighed 270 pounds. The plaintiffs brought a claim in negligence based on "mismatch." The appellate court affirmed summary judgment for the defendant as it held that there is no duty to a player to protect against the risk of injury from playing the game with players of different sizes and weights.[51]

In Maine, a fraternity member dove into a mud field being used for mud football which was located at the fraternity house owned by defendant building association. The student broke his neck and became a quadriplegic. The Maine Supreme Judicial Court held that just because the defendant had the ability to control activities of the fraternity does not give rise to a legal duty. The defendant played no active role in the event and had no duty to act affirmatively to protect the plaintiff from a danger it had not created.[52]

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[48] Scrapchansky v. Town of Plainfield, 627 A.2d 1329 (Conn. 1993).

[49] Oropeza v. Board of Educ. of Chicago, 606 N.E.2d 482 (Ill. App. Ct. 1992).

[50] Edmondson v. Brooks County Bd. of Educ., 423 S.E.2d 413 (Ga. Ct. App. 1992).

[51] Laiche v. Kohen, 621 So. 2d 1162 (La. Ct. App. 1993).

[52] Hughes v. Beta Upsilon Bldg. Ass'n, 619 A.2d 525 (Me. 1993).

In another case which was heard by the federal district court in Maine and used the above case as precedent, a college varsity tennis player was severely injured at a resort in Puerto Rico to which the team went for a spring break trip. The coach accompanied the team and they practiced for three hours a day but had the rest of the time to do as they wished. The plaintiff became inebriated one night and suffered injury as he wandered around the premises. The district court held that the coach owed no duty to the player since the plaintiff was an adult who voluntarily chose to drink. Neither the college nor the coach supplied the alcohol. The mere ability to control (assuming the coach had the ability) does not give rise to a legal duty.[53]

A cheerleader for a state university fell during an attempt to perform a stunt allegedly beyond her capability to perform safely. There was no adult supervision at practice and the two captains of the squad "controlled" practices. All of the cheerleaders had attended summer camps where they learned safety considerations. The Louisiana appellate court held that there was no duty owed by the university to provide supervision and to monitor their activities for safety.[54]

The next case has become a "duty" case this year whereas last year it was in the "no duty" category. A university lacrosse player died after he suffered cardiac arrest during an off-season practice. The student had no history of heart disease and he did not suffer any contact with another person, stick, or ball prior to his collapse. The plaintiffs alleged that the college failed in its duty to provide prompt medical treatment for its athletes. Using a "foreseeability" analysis, the federal district court found that there was no duty to anticipate and guard against the cardiac arrest of a healthy student-athlete when it occurs in a manner unconnected to the risks of the game.[55]

The Third Circuit reversed finding that the college owed the player a duty of care based on the special relationship between a college and a player engaged in the activity for which he has been recruited. The college owed a duty to take reasonable precautions against the risk of reasonably foreseeable life-threatening injuries during participation in athletic events.[56]

In Illinois, a sixth grader was hit by a discus thrown by an eighth grader during the warm-up period prior to a track meet. The warm-up period was not supervised and the injured student alleged that this failure of supervision was a breach of duty by the host school. The appellate court reversed the summary judgment which had been granted for the defendants and reasoned that there is a duty to supervise warm-ups due to the hazardous nature of discus throwing.[57]

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[53] Albano v. Colby College, 822 F. Supp. 840 (D. Me. 1993).

[54] Fisher v. Northwestern State Univ., 624 So. 2d 1308 (La. Ct. App. 1993).

[55] *See* THE YEARBOOK OF EDUCATION LAW 1993 at 148, Kleinknecht v. Gettysburg College, 786 F. Supp. 449 (M.D. Pa. 1992).

[56] Kleinknecht v. Gettysburg College, 989 F.2d 1360 (3d Cir. 1993).

Upon remand from the appellate court, the trial court granted a directed verdict for the defendants. This judgment was affirmed when the action again found its way to the appellate court. Under the circumstances of this case the level of supervision was not willful and wanton conduct for which the school district could be liable.[58]

In the final case dealing with the issue of duty, a high school football player became a quadriplegic when he was tackled. The action was brought against the state high school athletic association, the national federation of high school athletic associations, and NOCSAE (a group which sets equipment standards for athletics). The plaintiffs alleged negligence in setting safety standards for athletic equipment used in football.

The Ohio appellate court found no duty of care pursuant to section 323 of the Second Restatement of Torts because the defendants' alleged failure to exercise reasonable care did not increase the risk of harm to the plaintiff nor did the plaintiff rely to his detriment upon the defendants. However, the court held that there may be a duty under Restatement section 324A in that one who undertakes to render services "which he should recognize as necessary for the protection of a third person" must do so reasonably. The matter was therefore remanded to the trial court to consider the above law.[59]

There were four cases that dealt with the issue of assumption of risk. In a New York case a student fell through a window in a school building as he was engaged in a game of "ring-o-levio." The appellate court reversed the trial court's denial of defendant school district's motion for summary judgment on the basis that the injured student assumed the risk of falling by playing the game.[60]

In a case heard by the Indiana Supreme Court, a college student's knee was injured in a judo class when a fellow student threw her to the mat. A jury verdict of $50,000 was reversed by the appellate court on the basis that the plaintiff "incurred the risk." However, the supreme court vacated the opinion of the appellate court and affirmed the judgment of the trial court. Incurred risk, according to the court, involves a "conscious, deliberate and intentional embarkation upon a course of conduct with knowledge of the circumstances. It requires much more than general awareness of the potential for mishap. Incurred risk contemplates acceptance of a specific risk of which the plaintiff has actual knowledge." It was a factual question for the jury as to whether knee injury was within plaintiff's actual knowledge and appreciation.[61]

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[57] *See* THE YEARBOOK OF EDUCATION LAW 1992 at 148, Poelker v. Macon Community Unit Sch. Dist. No.5, 571 N.E.2d 479 (Ill. App. Ct. 1991).

[58] Poelker *ex rel.* Poelker v. Warrensburg Latham Community Unit Sch. Dist. No. 11, 621 N.E.2d 940 (Ill. App. Ct. 1993).

[59] Wissel v. Ohio High Sch. Athletic Ass'n, 605 N.E.2d 458 (Ohio Ct. App. 1992).

[60] Kelly v. Great Neck Union Free Sch. Dist., 597 N.Y.S.2d 136 (N.Y. App. Div. 1993).

Two California cases, in which the courts struggled to make sense of recent California Supreme Court rulings on assumption of risk, complete this section. In the first, a ten-year-old student was hit in the eye by a dirt clod thrown by another student at recess. The clod throwing was apparently an established practice by students. The California Court of Appeals held that the doctrine of implied assumption of risk would not bar the plaintiffs from holding the school district liable for negligent failure to supervise.[62]

The second case involved a student at a jockey school who sued the school and the instructor after a horse fell with him aboard. The plaintiff, a Malaysian, was not fluent in the English language and had no experience riding horses before his enrollment at the school, eight months before this incident. In those eight months, the plaintiff had fallen and seen others fall but had not seen a serious accident.

The California appellate court held that a reasonable implied assumption of risk may diminish recovery but does not serve as a complete bar. Also, the riding instructor and school owed the student a duty of ordinary care to see that the horse assigned to the plaintiff was safe to ride. Based on these points, the appellate court reversed the trial court's grant of summary judgment against the plaintiff on the basis of implied assumption of risk.[63]

Two cases dealt with documents containing exculpatory language: (1) a covenant not to sue, and (2) a waiver form. In a case from Nebraska, a school district arranged a ski trip for students. One of the vehicles used was a van which was owned and driven by a local resident who was not a school district employee. The driver was not paid wages but his gasoline and lodging were to be paid by the district. This driver's van was involved in a single vehicle accident in which a student was killed. A suit was brought against the driver and against the school district for negligent entrustment.

The Nebraska Supreme Court dealt with the effect a covenant not to sue, which plaintiffs entered into with the van driver, had upon the cause of action against the school district. Since the driver was acting as an agent of the school district, the settlement with the agent operated as a settlement with the principal (i.e., the school district). Summary judgment for the school district was affirmed.[64]

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[61] Clark v. Wiegand, 617 N.E.2d 916 (Ind. 1993).
[62] Lucas v. Fresno Unified Sch. Dist., 18 Cal. Rptr. 2d 79 (Cal. Ct. App. 1993).
[63] Tan v. Goddard, 17 Cal. Rptr. 2d 89 (Cal. Ct. App. 1993).
[64] McCurry v. School Dist. of Valley, 496 N.W.2d 433 (Neb. 1993).

The second case was a wrongful death action brought against the instructor of a scuba diving class and his employer, a private college. The student died from an air embolism as ascended too rapidly from a deep-water dive. The student had signed a waiver form at the beginning of the semester which made specific mention of the university in its waiver language but not of the instructor.

The Washington appellate court focused on the effect of this waiver on the suit as it affirmed summary judgment for the instructor and the college. The waiver was not against public policy; there is no public interest in a private school offering scuba diving instruction to qualified students as an elective course. Also, the release of an "employer" from liability serves to release the "employee" as well.[65]

In an Oregon case the appellate court gave consideration to the concept of foreseeability. The plaintiff, who was on a basketball scholarship, had his nose severely injured while playing football. He had surgery and was forbidden to participate in athletics while his nose healed. His eye was almost swollen shut and his face was noticeably bruised.

Nonetheless, his basketball coach "urged" him to play in a basketball scrimmage. The plaintiff stated that he was afraid that if he did not play he would lose his basketball scholarship. In the course of the scrimmage, he was hit in the eye and his nose was reinjured. Summary judgment for the defendant coach was reversed because a jury could find it foreseeable that the student would suffer an eye injury when directed to participate in a scrimmage after suffering injuries which had impaired his vision.[66]

Spectators. The first two cases in this section held that there was "no duty" owed to the plaintiffs. In Utah, an appellate court found no duty owed by the university to pedestrians who were injured while crossing a state-owned street en route to a university basketball game. The pedestrians were not business invitees of the university since they were on a state-owned street when the accident occurred.[67]

In a California case, a bicyclist was struck by an auto driven by a person who was allegedly distracted by a football game in progress on the school premises. The duty to maintain facilities in a safe condition extends only to persons on the school grounds and not to a cyclist on an adjacent road. There was no duty to erect a barrier next to the field to prevent motorists from looking at games on the field.[68]

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[65] Boyce v. West, 862 P.2d 592 (Wash. Ct. App. 1993).

[66] Lamorie v. Warner Pacific College, 850 P.2d 401 (Or. Ct. App. 1993).

[67] Cannon v. University of Utah, 866 P.2d 586 (Utah Ct. App. 1993).

[68] Lompoc Unified Sch. Dist. v. Superior Ct., 26 Cal. Rptr.2d 122 (Cal. Ct. App. 1993).

The Missouri Supreme Court decided a case against a school district on the proximate causation issue. A spectator at a private high school football game was hurt when the bleacher board broke. Plaintiff sued the high school and the city which leased the field and bleachers to the school. Summary judgment in favor of the school board was affirmed because even if the school breached its duty to inspect the bleachers, this breach could not have caused the injury. Plaintiff admitted that the allegedly hazardous condition of the bleachers could not have been discovered by an inspection prior to the game. Therefore, a failure to inspect cannot be the proximate cause of the injury if no warning would have been forthcoming if the inspection had been performed.[69]

Immunity was the critical issue in the next two cases. In the first, the sponsor of a cheerleading group, which was attending a cheerleading camp at a state university, fell on the sidewalk as the group was en route to the student center for evening activities. The university was held immune because the sidewalk was to be maintained by the city. The university had no right or obligation to maintain the sidewalk.[70]

In Ohio a spectator at a high school football game broke her leg as she stepped in a hole on the grounds. The appellate court reversed summary judgment for the defendant board of education as it held that the maintenance of stadium grounds was not a discretionary decision entitling the board to immunity.[71]

A spectator at a college baseball game who was hit by a foul ball was unsuccessful in her suit against the university. The plaintiff was an invitee and was owed the duty to protect her against foreseeable and unreasonable risks of harm. However, the danger of being hit by a foul ball is open and obvious. Furthermore, the defendant complied with the duty to protect spectators by offering protected seating, in which the plaintiff chose not to sit.[72]

Bailment

A high school basketball player alleged that his coach failed to gave him a letter from a college which stated that he was being recruited for a basketball scholarship. The letter was not given to him for seven months, as a result of which he alleged that he lost his chance for the scholarship. He sought damages against the school district for the monetary equivalent of four years tuition at the college which had recruited him. He argued a cause of action based on bailment.

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[69] Martin v. City of Washington, 848 S.W.2d 487 (Mo. 1993).
[70] Dorlon v. City of Springfield, 843 S.W.2d 934 (Mo. Ct. App. 1992).
[71] Hallett v. Stow Bd. of Educ., 624 N.E.2d 272 (Ohio Ct. App. 1993).
[72] Bellezzo v. State, 851 P.2d 847 (Ariz. Ct. App. 1992).

The Illinois Appellate Court decided that the information in the letter was properly the subject of a bailment. Summary judgment for the school district was not appropriate.[73]

Employment

Nineteen cases which dealt with employment issues were decided in 1993. Three cases dealt with adverse employment decisions, six concerned contract disputes, three were collective bargaining matters, three cases dealt with discrimination issues, one was a First Amendment case, and three were workers' compensation claims.

Adverse Employment Decisions

Refusal to Renew Coaching Contract. A tenured teacher and football coach was relieved of his coaching responsibilities. He alleged that the nonrenewal of his coaching duties was not done in accordance with the Teacher Tenure Act. The Missouri appellate court held that the Act did not prevent the board from unilaterally eliminating extracurricular activities. The Act's provisions do not extend to coaching duties.[74]

The South Dakota Supreme Court decided a case dealing with the nonrenewal of the coaching contract of a basketball coach. The court found actual bias by the board members in its decision not to renew the contract. The board's decision was arbitrary and capricious and the court ordered the reinstatement of the coach with backpay.[75]

A teacher and coach alleged that his constructive discharge from his coaching position without a hearing violated his due process rights. The Eighth Circuit Court of Appeals affirmed summary judgment for the defendant. A hearing was unnecessary in this situation because the school board offered a new contract to the plaintiff which made moot the plaintiff's request for a hearing on nonrenewal.[76]

Contract Disputes

A former college football coach sued the college for the breach of a two-year oral extension of his employment contract. The Illinois Appellate Court affirmed the dismissal of the claim because the coach

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73. Liddle v. Salem Sch. Dist. No. 600, 619 N.E.2d 530 (Ill. App. Ct. 1993).
74. Sadler v. Board of Educ. of Cabool Sch. Dist. R-4, 851 S.W.2d 707 (Mo. Ct. App. 1993).
75. Riter v. Woonsocket Sch. Dist. 55-4, 504 N.W.2d 572 (S.D. 1993).
76. Hubbard v. Parker, 994 F.2d 529 (8th Cir. 1993).

did not establish that the oral extension was supported by sufficient written memoranda in order to satisfy the statute of frauds.[77]

Another former college coach sued the college to receive his vacation pay. Although the contract required the coach to take vacation pay during the term of the contract, he was encouraged by the athletic director to take vacation in the summer which was after the end of the initial contract term. Summary judgment for the defendant was not appropriate.[78]

In another higher education case, the plaintiff resigned as head basketball coach after allegedly misappropriating funds from a student's Pell Grant check. He resigned to avoid facing formal charges on this matter. The plaintiff was unable to prevail in his section 1983 action because he was unable to show that the action taken was in accordance with a policy or custom.[79]

A teacher/coach claimed that the board of education improperly refused to renew his supplementary coaching contracts. The coach allegedly made an improper racial remark. The Ohio Court of Appeals held that no hearing was necessary because there was no entitlement of renewal.[80]

The above plaintiff also brought a section 1983 action based on a denial of substantive due process. The Sixth Circuit Court of Appeals affirmed summary judgment for the defendant. If there were indeed a stigma attached to his termination, that stigma may be a violation of a liberty interest but could not be a violation of substantive due process as alleged here.[81]

A nontenured teacher/coach of a girls' basketball team was terminated due to racial slurs directed at her players. The Louisiana appellate court affirmed the reinstatement to the coaching position. The school board failed to follow its own separation policy by terminating her without a recommendation of dismissal from her immediate supervisor and the superintendent.[82]

In Georgia, a former high school football coach was relieved of his duties based on an investigation by the Professional Practices Commission which found wrongdoing by him in connection with changing a student's grade so that the student would be eligible to play football. In this section 1983 action brought against the school district, board members, state high school association, and Professional Practices

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[77] Dickens v. Quincy College Corp., 615 N.E.2d 381 (Ill. App. Ct. 1993).

[78] Martz v. MacMurray College, 627 N.E.2d 1133 (Ill. App. Ct. 1993).

[79] Griffin v. Triton College, 822 F. Supp. 1322 (N.D. Ill. 1993).

[80] *See* The Yearbook of Education Law 1993 at 156, Holthaus v. Cincinnati Bd. of Educ., 602 N.E.2d 360 (Ohio Ct. App. 1991).

[81] Holthaus v. Board of Educ., Cincinnati Pub. Sch., 986 F.2d 1044 (6th Cir. 1993).

[82] Easterling v. Monroe City Sch. Bd., 612 So. 2d 975 (La. Ct. App. 1993).

Commission, the federal district court held that the coach had no property interest in coaching. Furthermore, the release of PPC's investigative report was not a deprivation of a liberty interest. However, issues of fact remain regarding whether statements made by the executive director of PPC were defamatory.[83]

Collective Bargaining

A high school basketball coach was advised that his supplemental contract position would be vacated at the end of the school year. In arbitration between the board of education and the teachers' association, the arbitrator awarded reinstatement. The Ohio Court of Appeals upheld the order of reinstatement.[84]

A high school basketball coach agreed to give up his seniority rights in exchange for a supplemental contract which had a term of three years. The education association filed an unfair labor practice complaint with the state labor relations board alleging that this multi-year contract violated the collective bargaining agreement. The Pennsylvania appellate court affirmed a finding of an ULP because the offer of a multi-year contract was a unilateral change in the terms and conditions of employment, a mandatory subject of bargaining. It was irrelevant here that the school district's action benefitted the coach; it still undermined the collective bargaining process.[85]

The Pennsylvania Labor Relations Board held that a school district committed an unfair labor practice by transferring the duties of athletic director to a nonbargaining unit employee. The Pennsylvania appellate court reversed on the basis that the position of athletic director is a supplemental one which is not covered by the collective bargaining agreement; there is, therefore, no obligation to bargain before taking action relative to this position.[86]

Discrimination

Race. A white football coach sued the school district, the superintendent, and two school board members under section 1983 and title VII claiming that the nonrenewal of his contract was for racially discriminatory reasons. Summary judgment as to the claims against the school district was inappropriate because fact questions remained. However, summary judgment on behalf of the individual defendants was warranted because there was a lack of evidence to show that racial animus was the motivating factor in their actions.[87]

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[83] Brewer v. Purvis, 816 F. Supp. 1560 (M.D. Ga. 1993).

[84] Board of Educ. of the Dayton City Sch. Dist. v. Dayton Educ. Ass'n, 610 N.E.2d 615 (Ohio Ct. App. 1992).

[85] Millcreek Township Sch. Dist. v. Pennsylvania Labor Relations Bd., 631 A.2d 734 (Pa. Commw. Ct. 1993).

[86] Harbor Creek Sch. Dist. v. Pennsylvania Labor Relations Bd., 631 A.2d 1069 (Pa. Commw. Ct. 1993).

In a case which has gone on for a decade, a white coach, a minority at his school, brought a race discrimination suit. The plaintiff brought claims based on sections 1981 and 1983 alleging that his involuntary transfer was racially motivated. The Fifth Circuit Court of Appeals ruled that the plaintiff had established a prima facie case of discrimination. It also ruled that respondeat superior was inapplicable in a section 1981 claim to impose liability upon the school district.[88]

The Supreme Court affirmed that portion of the appellate court's opinion regarding section 1981 liability. A municipality may not be held liable for its employees' violations of section 1981 under respondeat superior. Express "action at law" under section 1983 provides the exclusive federal damages remedy for the violation of rights guaranteed by section 1981 when the alleged violation is by a state actor.[89]

On remand from the Supreme Court to the Fifth Circuit, this court held that the superintendent did not have final policymaking authority in the area of employee transfers which would subject the school district to liability in a section 1983 action. The judgment against the school district was reversed and remanded with directions to enter judgment for the school district regarding all plaintiff's claims against the district.[90]

Disability. A university basketball coach was discharged after he was arrested for drunk driving. The coach was able to state a prima facie claim under the Rehabilitation Act. He argued, first, that his handicap is "alcoholism" which is entitled to protection under that Act. Furthermore, he claimed that his alcoholism did not impede his ability to satisfactorily function as a coach. Finally, he alleged that his termination was due solely to his alcohol abuse. Therefore, plaintiff's claim survived a motion to dismiss on the claim under the Rehabilitation Act.[91]

First Amendment

A university administrator who coordinated academic support for student-athletes alleged that her contract was not renewed in violation of her First Amendment rights. This administrator had refused to divulge.

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[87] Wilkerson v. Columbus Separate Sch. Dist., 985 F.2d 815 (5th Cir. 1993).

[88] *See* THE YEARBOOK OF EDUCATION LAW 1987 at 193, Jett v. Dallas Indep. Sch. Dist., 798 F.2d 748 (5th Cir. 1986).

[89] *See* THE YEARBOOK OF EDUCATION LAW 1990 at 170, Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989).

[90] Jett v. Dallas Indep. Sch. Dist., 7 F.3d 1241 (5th Cir. 1993).

[91] Mackey v. Cleveland State Univ., 837 F. Supp. 1396 (N.D. Ohio 1993).

to the campus police, information which she had received regarding certain student-athletes' involvement with gambling. The federal district court held that even if this information was considered to be a "matter of public concern," the refusal to renew her contract did not violate her First Amendment rights. The university's responsibility to keep athletics free from illegal activities outweighed the plaintiff's interest in keeping the information confidential.[92]

Workers' Compensation

An injury sustained by a teacher in a basketball game between students and teachers was held to be compensable in Florida. The appellate court noted that this was a school activity held during regular school hours in which teachers were required to play or spectate.[93]

The last two cases in this section both deal with high school game officials who sought workers' compensation for injuries received during the course of officiating. Both officials broke their legs and both claimants were unsuccessful as the courts (in South Carolina[94] and Colorado[95]) held them to be independent contractors. The courts looked to the indicia of "control" in deciding that they were not employees.

Miscellaneous

Criminal Law

In a case dealing with sport agents, the defendant was convicted of mail fraud. He had induced a number of collegiate players to sign agreements with him providing that he was to act as their agent. However, a number of these agreements were contrary to NCAA rules which prohibit a player with remaining eligibility to sign with an agent. The loss of the player's eligibility ensues if this violation is discovered. The appellate court reversed and remanded for a new trial. The defendant moved to dismiss the indictment on the basis that the mail fraud statute was not applicable to his actions. However, the federal district court held that the right to control the allocation of scholarships was a right protected by the mail fraud statute. The actions taken by the defendant deprived colleges of the right to allocate scholarships on the basis of truthful representations regarding eligibility.[96]

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[92] Gotlob v. Beyard, 837 F. Supp. 26 (D. Conn. 1993).

[93] Highlands County Sch. Bd. v. Savage, 609 So. 2d 133 (Fla. Dist. Ct. App. 1992).

[94] Farrar v. D.W. Daniel High Sch., 424 S.E.2d 543 (S.C. Ct. App. 1992).

[95] Brighton Sch. Dist. v. Lyons, No.92 CA 2075, 1993 WL 497535 (Colo. Ct. App. Dec. 2, 1993).

[96] *See* THE YEARBOOK OF EDUCATION LAW 1992 at 156, United States v. Walters, 775 F. Supp. 1173 (N.D. Ill. 1991).

The Seventh Circuit Court of Appeals held that a mail fraud conviction cannot be supported on the evidence at hand. The forms mailed by colleges to the NCAA verifying eligibility were not sufficiently integral to the defendant's plan to sign players secretly to agency contracts.[97]

Contracts

A university sued the manufacturer, engineer, and subcontractor of a failed project to build two practice fields for the football team. The case was brought on theories of breach of contract, breach of implied warranty and negligence. A verdict was rendered for the university on the basis of negligence. However, the judgment was not entered as joint and several liability and the university appealed. The Florida appellate court held that there was joint and several liability here because the university suffered a single, indivisible economic injury produced by the defendants acting in concert.[98]

First Amendment

A junior high school girl basketball player challenged the school district's practice of letting the coach sponsor prayers at the end of games and at practices. The Fifth Circuit Court of Appeals affirmed a preliminary injunction issued in favor of the plaintiffs. Based on the court's reading of *Lee v. Weisman*,[99] there was a substantial likelihood of success on the merits of the plaintiffs' establishment clause argument.[100]

Wiretapping

A university basketball player sued the assistant coach at another university alleging that the coach violated the Illinois eavesdropping statute and the federal wiretapping statute when he recorded a phone conversation he had with the player. The disclosures made in this conversation led to an NCAA investigation of the player and his school. The federal district court granted defendant's motion for summary judgment because a person who is a party to a communication may intercept it unless the purpose of the recording was the commission of a crime or tort (e.g., blackmail, defamation). Since that was not the case here, the federal wiretapping statute did not apply to preventing the recording nor did the Illinois eavesdropping statute apply since the assistant coach had legitimate access to the conversation.[101] The Seventh Circuit Court of Appeals affirmed, although its analysis relative to the federal wiretapping statute took a different approach than the district court.[102]

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[97] United States v. Walters, 997 F.2d 1219 (7th Cir. 1993).

[98] University of Miami v. All-Pro Athletic Surfaces, 619 So. 2d 1034 (Fla. Dist. Ct. App. 1993).

[99] Lee v. Weisman, 112 S. Ct. 2649 (1992).

[100] Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160 (5th Cir. 1993).

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[101] *See* THE YEARBOOK OF EDUCATION LAW 1993 at 160; Thomas v. Pearl, 793 F. Supp. 838 (C.D. Ill. 1992).

[102] Thomas v. Pearl, 998 F.2d 447 (7th Cir. 1993).

7

HIGHER EDUCATION

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Introduction

The volume of case law for this year continues to be high across a wide variety of issues. Intergovernmental relations cases included an environmental challenge to protect an endangered species of squirrel located in and around the construction site of a number of telescopes on a mountain in Arizona. Several university hospitals challenged the reimbursement schemes for federal medical programs which left out training expenses for medical doctors. Discrimination litigation involved the dual systems of higher education in Louisiana and Alabama and controversies surrounding the court ordered break up of those systems. Several cases challenged the forced retirements of university employees just prior to the uncapping of the mandatory retirement laws in higher education. Procedural questions on the Americans with Disabilities Act included the availability of both an administrative remedy and a private right of action. Faculty litigation in the areas of nonrenewal, denial of tenure, and termination of tenured faculty for cause continued to be very active.

Students and a private foundation challenged a United States Department of Education policy allowing the continued existence of student loans and grants provided exclusively to minorities. Students and a corporation continued a challenge of a university's prohibition of solicitation activities in a student's dorm room. Student financial aid, academic dismissal, and disciplinary dismissal cases had substantial litigation this year.

In the area of liability, the plaintiffs, colleges and universities in the United States, were declared a class and allowed to commence procedures to bring class action against several asbestos companies. Personal injury, negligence, contracts, and deceptive practice cases seem to be the dominant areas for litigation. Rounding out the chapter are cases litigating antitrust law, patent rights, and estate and will probate.

Intergovernmental Relations

The relationships between governmental agencies and post-secondary institutions are manifested through litigation in a number of ways. Some cases challenged the authority of boards of trustees, the state legislature, and state regulatory agencies. Other cases dealt with controversies surrounding taxation, zoning, environmental regulations, jurisdiction of campus police, health care regulations, and ownership.

Board Authority

The makeup and authority of boards of trustees or state regents were at issue. A Mississippi private citizen challenged the constitutional provisions which provided for the appointment of the Board of Trustees of State Institutions. The plaintiff lost the argument that the trustees were a fourth branch of government, requiring the application of the one-man one-vote rule. The court found that the state constitution organized the Board of Trustees as an administrative body (i.e., a part of the executive branch of state government negating the representative requirements of the legislative branch of government). In an Illinois case involving the election of members of the community college district board, one of the

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1. Van Slyke v. Board of Trustees of State Insts. of Higher Learning, 613 So. 2d 872 (Miss. 1993).

elected board members challenged the procedures used to arrive at placement on the ballot.[2] The court, while not invalidating the election, found that allowing a defeated candidate to submit two petitions, giving him two selections for ballot placement, violated the state statute prohibiting additions to the petition.

A private university foundation board was sued for false arrest and other charges when an individual, with power of attorney from a member of the board, was refused admission to the board meeting and was subsequently arrested.[3] A federal district court granted summary judgment to the foundation board finding that power of attorney did not give him the right to attend the meeting.

Agency Authority

Agency authority and control of educational institutions continues to be questioned. A New York community college sued the State Higher Education Assistance Corporation (HEAC) for violations of due process in denying student aid payments.[4] Payment was refused to students where the college had violated its own admissions standards. A federal circuit court found that written response opportunities were sufficient to meet the college's due process requirements.

Licensing agency authority also came into question. In New York an association of career schools brought suit challenging New York laws establishing procedures for the approval of courses and curricula by the State Department of Education.[5] The federal district court found a compelling state interest in the control of private school courses and curriculum to prevent fraud. The court found the regulations to be narrowly configured and containing procedural safeguards to avoid First Amendment infringements. In a Florida case, an association of dental hygienists successfully challenged the State Department of Professional Regulation, Board of Dentistry decision to grant a license to operate a dental hygiene program to an Arkansas institution.[6] The association maintained that the standards in Arkansas did not meet the national accreditation standards set by the American Dental Association.

Licensing and Accreditation. A New York truck driving school unsuccessfully challenged a fine and five-day suspension of its operator's license for using an uncertified instructor.[7] A private accrediting association's withdrawal of accreditation was not action by the state nor arbitrary or capricious when it was based on the school's poor financial condition.[8] In a case involving accreditation of a hospital residency training program, the court found that the state board of medicine had the final authority over the award of accreditation to medical training programs.[9] However, the hospital, in a withdrawal of residency decision, must be given a hearing before the board.

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[2] Stephens v. Education Officers Electoral Bd., 603 N.E.2d 642 (Ill. App. Ct. 1992).

[3] Miranda v. President & Directors of Georgetown College, 818 F. Supp. 16 (D.D.C. 1993).

[4] Interboro Inst. v. Foley, 985 F.2d 90 (2d Cir. 1993).

[5] New York State Ass'n of Career Sch. v. State Educ. Dep't of N.Y., 823 F. Supp. 1096 (S.D.N.Y. 1993); *see* YEARBOOK OF EDUCATION LAW 1993 at 166, New York State Ass'n of Career Sch. v. State Educ. Dep't of N.Y., 142 F.D.R. 403 (S.D.N.Y. 1992).

[6] Department of Professional Regulation, Bd. of Dentistry v. Florida Dental Hygienist Ass'n, 612 So. 2d 646 (Fla. Dist. Ct. App. 1993).

Sunshine Laws. State sunshine or open meeting laws were before the courts again this year. Access to the proceedings of the University of Georgia student organization's court was sought by the institution's student newspaper.[10] The Georgia Supreme Court ruled that the student organization court was a public body subject to the state open meeting laws. A Louisiana newspaper sought the names, social security numbers, and addresses of a public university's employees.[11] The court ruled that the names and social security numbers were a matter of public record, but that the president was correct in allowing each employee to determine whether to allow his or her address, which was not public information, to be released. An Ohio court ruled that the names of donors to a private corporation, which was organized to benefit a public university, were public records subject to disclosure.[12] However, a Florida court ruled that the audit report of a private foundation could be released to a newspaper, but that the names of the donors were not subject to disclosure as public information.[13] An animal rights group was successful in gaining access to the proceedings of a Vermont university's animal care committee.[14] The Vermont Supreme Court found that the state open meeting provisions applied to a committee appointed by university officials even where the committee was required to function because of the receipt of federal funds.

Taxation. Taxation issues involving both public and private institutions were before the courts. A North Carolina court found that the Atlantic Coast Conference headquarters was exempt from property tax.[15]

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[7] National Tractor Trailer Sch. v. Commissioner, N.Y. State Dep't of Motor Vehicles, 594 N.Y.S.2d 503 (N.Y. App. Div. 1993).

[8] Peoria Sch. of Business v. Accrediting Council for Continuing Educ. & Training, 805 F. Supp. 579 (N.D. Ill. 1992).

[9] McKeesport Hosp. v. Pennsylvania State Bd. of Medicine, 628 A.2d 476 (Pa. Commw. Ct. 1993).

[10] Red & Black Publishing Co. v. Board of Regents, 427 S.E.2d 257 (Ga. 1993).

[11] Hays v. Lundy, 616 So. 2d 265 (La. Ct. App. 1993).

[12] State *ex rel.* Toledo Blade Co. v. University of Toledo Found., 602 N.E.2d 1159 (Ohio 1992).

[13] Palm Beach Community College Found. v. WFTV, 611 So. 2d 588 (Fla. Dist. Ct. App. 1993).

[14] Animal Legal Defense Fund v. Institutional Animal Care & Use Comm. of the Univ. of Vt., 616 A.2d 224 (Vt. 1992).

[15] *In re* Atlantic Coast Conf., 434 S.E.2d 865 (N.C. Ct. App. 1993).

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The court found that the purpose of the athletic conference was educational, and that the receipt of 8% of revenues for the headquarters administrative expenses was not sufficient proof that it was organized for profit. The Colorado Supreme Court, on an appeal from a lower court,[16] found that the city had authority to assess fees for municipal services against a public community college, and that such ordinances do not compromise the authority of the State Land Board.[17] A Louisiana court ruled that a city had the authority to levy an inheritance tax on inheritance received by a private college located within the city.[18] The Iowa Supreme Court ruled that a day care facility and a vice president's residence on a private college, which also served as his office and a conference center, were exempt from property tax. In another decision, the Iowa court found that sewage rates based on water consumption were not discriminatory.[19] However, in Illinois, the court found that property leased to a university by a private foundation but not used primarily for educational purposes, was not exempt from real estate tax.[20] Rutgers University students living in university owned apartments were unsuccessful in their attempt to become qualified for rebates under the State Homestead Property Tax Rebate Act.[21] The court found that neither the students nor the university paid property tax on properties, such as dormitories, used for educational purposes. Finally, the Pennsylvania Supreme Court, affirming a lower court decision,[22] found that a local bank office on property leased from a tax exempt public university was subject to county property tax.[23]

Zoning. A number of zoning questions were litigated. In Pennsylvania, the state, through a public college, could not be held liable for an inadequate storm sewage system installed by a previous owner.[24] However, the township which had approved the sewage system could be found liable for the inadequate system. The Supreme Court of New Mexico found that a liquor store could operate within 300 feet of a university owned parking lot, a property not used for "functional" educational purposes under the law.[25] A Tennessee court ruled that the construction of a parking lot on the campus was not prohibited under the adopted urban renewal plan.[26] A Louisiana court ruled that university land located off campus would be subject to the city zoning laws even though zoning laws were not enforceable on the campus.[27]

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[16] *See* THE YEARBOOK OF EDUCATION LAW 1993 at 165, City of Littleton v. State, 832 P.2d 985 (Colo. Ct. App. 1991).

[17] City of Littleton v. State, 855 P.2d 448 (Colo. 1993).

[18] President & Bd. of Trustees of Spring Hill College v. City of New Orleans, 617 So. 2d 8 (La. Ct. App. 1993).

[19] State v. City of Iowa City, 490 N.W.2d 825 (Iowa 1992).

[20] Northern Illinois Univ. Found. v. Sweet, 603 N.E.2d 84 (Ill. App. Ct. 1992).

[21] Rutgers Univ. Legislative Affairs Council v. Thompson, 12 N.J. Tax 642 (N.J. Tax Ct. 1992).

[22] *See* THE YEARBOOK OF EDUCATION LAW 1991 at 194, County of Centre v. Pennsylvania State Univ., 565 A.2d 187 (Pa. Commw. Ct. 1989).

[23] Pennsylvania State Univ. v. County of Centre, 615 A.2d 303 (Pa. 1992).

[24] Pastore v. Commonwealth, State Sys. of Higher Educ., Edinboro Univ. of Pa., 618 A.2d 1118 (Pa. Commw. Ct. 1992).

A District of Columbia court ruled that a zoning board acted within the zoning regulations when it granted a variance to a university to upgrade a heat plant located in a zone marked residential.[28] The court also ruled that the heat plant was an "accessory use to the operation of the university" negating the need for a variance.[29] A Pennsylvania court affirmed a zoning board decision to change land owned by the university from residential to a planned institutional district.[30] The court also rejected the argument that this constituted spot zoning. The Supreme Court of North Carolina remanded a case, finding that the university proposed to build several duplexes, not a rooming house which was clearly prohibited under the zoning ordinance.[31] A private Massachusetts university was successful in getting a lower court to find that the construction of a parking garage on campus would meet the zoning parking requirements for a library addition; the college's receipt of a waiver of loading dock and set back requirements was legitimate; and the issuance of an order enjoining future application to the college of these requirements by the city zoning board would be appropriate.[32] On appeal, the state supreme court affirmed the parking lot interpretation, rejected the exemption from the set-back requirements, and ruled that the city could not be enjoined from future enforcement of the zoning laws on the campus.[33] Finally, a Maryland zoning law that determined how many unrelated people could live together, based on occupancy by students, was ruled to set up classes of people in violation of the state constitution and the Fourteenth Amendment equal protection clause.[34]

Environmental Issues. Environmental issues involving the new environmental regulations applied to land use. The leadoff case involved federal legislation[35] which bypassed federal environmental laws and allowed a public university, as part of an international consortium, to build telescopes on a mountain inhabited by an endangered species of red squirrel.[36] The controversy involved the United States Forest Services' management of a plan proposed by the university to study the squirrel and the effects of construction on its habitat. The appeals court commented on both the oversight responsibilities of the Forest Service and its decisions on matters requiring environmental or biological expertise. The court found that congressional intent supported the position that the agency was not bound by the specifics of the initial plan, but had oversight responsibilities which would allow for changes based on new information.[37] The court also noted that where experts disagree, the agency ought to have discretion to choose the best course. The court reasoned that judges do not possess this type of technical knowledge and that Congress intended such matters to be arbitrated by the Forest Service.[38]

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[25] Regents of Univ. of N.M. v. Hughes, 838 P.2d 458 (N.M. 1992).

[26] Steele v. Metropolitan Bd. of Zoning Appeals, 841 S.W.2d 324 (Tenn. Ct. App. 1992).

[27] Varnado v. Southern Univ. at New Orleans, 621 So. 2d 176 (La. Ct. App. 1993).

[28] Citizens Coalition v. District of Columba Bd. of Zoning Adjustment, 619 A.2d 940 (D.C. 1993).

[29] *Id.* at 950.

[30] Sharp v. Zoning Hearing Bd. of Township of Radnor, 628 A.2d 1223 (Pa. Commw. Ct. 1993).

[31] Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjustment, 431 S.E.2d 183 (N.C. 1993).

[32] Trustees of Tufts College v. City of Medford, 602 N.E.2d 1105 (Mass. App. Ct. 1992).

[33] Trustees of Tufts College v. City of Medford, 616 N.E.2d 433 (Mass. 1993).

[34] Kirsch v. Prince George's County, 626 A.2d 372 (Md. 1993).

[35] Arizona-Idaho Conservation Act of 1988, 1 *et seq.*, 102 Stat. 4571.

Another environmental case involving the clean up of a waste dump was back in the courts on appeal.[39] The aluminum manufacturing company had enjoined a New York university, which used the dumping ground for water from a coal fire, as a contributor to the clean up costs. The district court found that the university could be enjoined as a third party even though the Environmental Protection Agency had decided not to include the university in its original action. The Second Circuit Court of Appeals affirmed that decision, but remanded the case to the federal district court with instructions for determining the amount of clean up costs to be assessed to both parties.

The owner of a contaminated property brought action against both the wood processing company and its majority stockholder, a university.[40] On appeal, the court of appeals affirmed that the university was not the operator of the facility and should not be held liable under the Environmental Response, Compensation, and Liability Act of 1990.[41]

Jurisdiction. Jurisdictional questions were before the courts in a number of states. The Seventh Circuit Court of Appeals affirmed a federal district court summary judgment ruling that the recording of a conversation between a coach and a recruit, when the coach made the recording,

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36. Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568 (9th Cir. 1993); *see* THE YEARBOOK OF EDUCATION LAW 1993 at 170, Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441 (9th Cir. 1992).

37. *Id.* at 1574.

38. *Id.* at 1576.

39. United States v. Alcan Aluminum Corp., 990 F.2d 711 (2d Cir. 1993); *see* THE YEARBOOK OF EDUCATION LAW 1993 at 174, United States v. Alcan Aluminum Corp., 755 F. Supp. 531 (N.D.N.Y. 1991).

40. Jacksonville Elec. Auth. v. Bernuth Corp., 776 F. Supp. 1542 (M.D. Fla. 1991), *aff'd*, 996 F.2d 1107 (11th Cir. 1993).

41. 42 U.S.C. § 9601 *et seq.*

was not a violation of federal or state wiretap laws nor an action under color of state law.[42] The Illinois Court of Claims had jurisdiction in a dispute over the offering of training programs.[43] A private corporation had charged a public university with unfair competition, misappropriation, and tortious interference when it hired the corporation's employees and began offering training programs.

After a student was assaulted at a university, she brought negligence charges in her home county against the university for failing to prevent the assault. The university was successful in having the venue changed to the county were the alleged assault took place.[44] An Illinois court found that the statute of limitations under the Tort Immunity Act had expired, even though the actions of the arresting police cadet were inappropr[illegible] A Texas court found that a campus police officer could arrest an individual for an offense committed on a public street within the officer's view.[46] However, a Missouri campus police officer's testimony that he held a commission as a city police officer was insufficient to show that he had the authority to make an arrest.[47] A state appeals court threw out a conviction for driving under the influence because the arresting campus police officer stopped the motorcyclist for making an illegal left turn from a location which had an improperly placed no left turn sign.[48]

An Illinois court affirmed as appropriate the use of a law on sentence enhancement where a drug violation took place within 1,000 feet of a school, regardless of the school's location in an urban setting.[49] The Fifth Circuit Court of Appeals upheld a ruling that federal funds distributed through a state agency to a university job training program, were still federal funds subject to federal statutes prohibiting theft.[50] An Illinois court found that city police who also were employed part time by the college were not acting as city police when they arrested a student on campus.[51] In addition, the court found that they had probable cause to arrest, thereby avoiding false arrest and malicious prosecution charges. The Sixth Circuit Court of Appeals ruled that Eleventh Amendment immunity applied to a Kansas university because it was an arm of the state.[52] The court also held that the arresting officers had probable cause to arrest, giving them qualified immunity in the false arrest claim.

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[42] Thomas v. Pearl, 998 F.2d 447 (7th Cir. 1993); *see* THE YEARBOOK OF EDUCATION LAW 1993 at 172, Thomas v. Pearl, 793 F. Supp. 838 (C.D. Ill. 1992).

[43] Management Ass'n of Ill. v. Board of Regents of N. Ill. Univ., 618 N.E.2d 694 (Ill. App. Ct. 1993).

[44] Minervino v. University of Mont., 853 P.2d 1242 (Mont. 1993).

[45] Luciano v. Waubonsee Community College, 614 N.E.2d 904 (Ill. App. Ct. 1993).

[46] State v. Carroll, 855 S.W.2d 128 (Tex. Ct. App. 1993).

[47] Baris v. State, 846 S.W.2d 764 (Mo. Ct. App. 1993).

[48] State v. Grubb, 611 N.E.2d 516 (Ohio Ct. App. 1993).

[49] People v. Owens, 608 N.E.2d 159 (Ill. App. Ct. 1992).

[50] United States v. Long, 996 F.2d 731 (5th Cir. 1993).

[51] Myatt v. City of Chicago, 816 F. Supp. 1259 (N.D. Ill. 1992).

Ownership. Ownership cases included a New York case where a state dormitory authority could not be held liable for the disrepair of buildings in light of its financial agreement with the public university.[53] The university, as the actual owner, was responsible for building upkeep. A federal circuit court affirmed a lower court ruling that the State School of Mines would hold highly valued dinosaur fossil remains until the court could determine ownership.[54]

University Hospitals. Cases involving university teaching hospitals were again before the courts. In a federal district court, several teaching hospitals successfully challenged the new reimbursement scheme which allowed for a reaudit of base year costs.[55] However, on appeal, the District of Columbia Circuit Court reversed the ruling, finding that while the reimbursement scheme was ambiguous, it did allow for a reaudit of previously approved expenses for the medical education of medical students in training.[56] The court also found that the reaudit regulations did not represent retroactive rule making. In a similar case involving reimbursement for indirect costs, a federal court affirmed a lower court decision.[57] The court found that the indirect costs of a graduate medical program included the cost of "doctor in training" medical services. A federal district court denied a hospital's action questioning whether the hospital was required to pay Federal Insurance Contribution Act (FICA) taxes for student nurses working in the hospital.[58] The Sixth Circuit Court of Appeals ruled that the hospital would be exempt from FICA tax only where the nurses were working in the hospital for credit as part of their training program.[59]

Two other cases involving hospitals were litigated. One involved a hospital's attempt to be indemnified from a negligence claim against a doctor who was a member of the university's medical school faculty.[60] Absent an indemnification agreement between the university and the hospital, the hospital must bear the cost of defending itself in this action.

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[52] Hutsell v. Sayre, 5 F.3d 996 (6th Cir. 1993).

[53] Garcia v. Dormitory Auth. of State of N.Y., 599 N.Y.S.2d 600 (N.Y. App. Div. 1993).

[54] Black Hills Inst. of Geological Research v. United States Dep't of Justice, 978 F.2d 1043 (8th Cir. 1992).

[55] Methodist Hosp. of Memphis v. Sullivan, 799 F. Supp. 1210 (D.D.C. 1992).

[56] Administrators of Tulane Educ. Fund v. Shalala, 987 F.2d 790 (D.C. Cir. 1993).

[57] Ohio State Univ. v. Secretary, United States Dep't of Health & Human Servs., 996 F.2d 122 (6th Cir. 1993). *See* THE YEARBOOK OF EDUCATION LAW 1993 at 171, Ohio State Univ. v. Sullivan, 777 F. Supp. 582 (S.D. Ohio 1991).

[58] *See* THE YEARBOOK OF EDUCATION LAW 1993 at 171, Johnson City Medical Ctr. v. United States, 783 F. Supp. 1048 (E.D. Tenn. 1992).

[59] Johnson City Medical Ctr. v. United States, 999 F.2d 973 (6th Cir. 1993).

[60] Good Samaritan Hosp. & Health Ctr. v. Wright State Univ., 610 N.E.2d 1183 (Ohio Ct. App. 1992).

In another negligence claim a hospital was successful in denying access to materials used to evaluate a resident's clinical performance because such peer evaluation materials are privileged.[61]

Constitutional Issues. State and federal constitutional questions involving institutions of higher education were before the courts. A Wisconsin faculty member successfully brought a First Amendment challenge to a state law which prohibited state agency employees from having discussions with the state legislature over appropriations.[62]

A Minnesota teachers' union challenged a state statute allowing the state to reimburse colleges for tuition costs of nonsectarian courses taken by high school students.[63] The court found that reimbursing sectarian colleges for courses enrolled by high school students did not violate the state constitution's establishment clause. A college professor and a tax payers' association challenged a state constitutional provision prohibiting state employees from serving in the state legislature.[64] The court awarded summary judgment to the state, finding that both the professor and the taxpayers' association lacked standing. The court explained that even if standing existed, the equal protection claim lacked merit because school teachers, who can serve in the legislature, were found not to be state employees although college professors were. In a similar decision, a court upheld a state law prohibiting state employees from serving on the county election commission.[65]

Criminal Prosecution. Criminal charges were brought against a proprietary school owner for conspiracy and misapplication of federal funds.[66] The Eleventh Circuit Court of Appeals ruled that the evidence supported a conspiracy charge involving the changing of test scores to insure that students would qualify for federal student aid. However, the court found that there was insufficient evidence involving the timely return of loan moneys for students who withdrew from the program to support the misapplication charge.

Discrimination in Employment

Discrimination claims of employees under federal regulations and constitutional protections were litigated again this year. Nonrenewal, denial of tenure, and tenure track faculty (probationary faculty) cases were numerous. Termination of tenured faculty for cause, collective bar-

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61. Family Medical Ctr., L.T. v. Ramirez, 855 S.W.2d 200 (Tex. Ct. App. 1993).
62. Barnett v. Wisconsin Ethics Bd., 817 F. Supp. 67 (E.D. Wis. 1993).
63. Minnesota Fed'n of Teachers v. Mammenga, 500 N.W.2d 136 (Minn. Ct. App. 1993).
64. Hanak v. Taylor, 823 F. Supp. 392 (N.D. W. Va. 1993).
65. Morgan v. Neuse, 857 S.W.2d 826 (Ark. 1993).
66. United States v. Kammer, 1 F.3d 1161 (11th Cir. 1993).

gaining, and employment rights of administrators and staff continue to be litigated. The rights to various job benefits were contested issues along with a continuing increase in the number of sexual harassment cases.

Title VI

The issue of the dual system of higher education in Louisiana was again before the district court.[67] This case has a substantial history and a number of decisions.[68] This particular litigation is an attempt to stay the court ordered reorganization of the state system of higher education pending an appeal to the Fifth Circuit Court of Appeals. The court ruled that there was no basis for the award of a stay. The court stated that:

> After nearly twenty years of litigation, the state defendants continue to avoid addressing the heart of the substantive challenge to their system of higher education, relying instead on hyper-technical procedural objections that lack any merit in the context of this case considering the extensive prior proceedings and the present posture. Accordingly, the court finds that the state defendants have failed to present a substantial case on the merits.[69]

The dual system of higher education in Alabama was also before the courts again. The state system of higher education is under a court order designed to eliminate vestiges of discrimination and disestablish the dual system.[70] In one opinion the federal district court approved the admissions criteria of Auburn University as acceptable under the court order.[71] In another, the court defined the duties and appointed a monitor of state efforts to comply with the court order.[72]

The director of the Italian American Institute of the City University of New York (CUNY) brought discrimination and retaliation claims against CUNY.[73] His claim was that title VI was violated when Italian

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[67] United States v. Louisiana, 815 F. Supp. 947 (E.D. La. 1993).

[68] *See* The Yearbook of Education Law 1989 at 204, United States v. Louisiana, 692 F. Supp. 642 (E.D. La. 1988); *see* The Yearbook of Education Law 1990 at 203, United States v. Louisiana, 718 F. Supp. 499 (E.D. La. 1989); *see* The Yearbook of Education Law 1992 at 178, United States v. Louisiana, 751 F. Supp. 606 (E.D. La. 1990), 751 F. Supp. 608 (E.D. La. 1990), 751 F. Supp. 621 (E.D. La. 1990).

[69] United States v. Louisiana, 815 F. Supp. 947, 953 (E.D. La. 1993).

[70] *See* The Yearbook of Education Law 1993 at 174, Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991).

[71] Knight v. Alabama, 801 F. Supp. 577 (N.D. Ala. 1992).

[72] Knight v. Alabama, 829 F. Supp. 1286 (N.D. Ala. 1993).

[73] Scelsa v. City Univ. of N.Y., 806 F. Supp. 1126 (S.D.N.Y. 1992).

Americans were discriminated against. The director also claimed retaliation in the breakup of the Institute by dispersing it across several of the university's campuses. The court found enough evidence of irreparable harm to award the plaintiff a preliminary injunction. Later, the court ordered the award of attorney fees to the plaintiff as the prevailing party in the award of a preliminary injunction.[74]

In a related discrimination case, tolling was at issue.[75] A California plaintiff had filed a claim of civil rights discrimination under federal statutes 1981, 1983, 1985, and title IX of the Education Amendments of 1972. The court found that the statute of limitations of one year applied to all of these federal statutes, and that time had tolled before the filing of this claim.

Title VII

Discrimination in employment based on race, religion, national origin, and gender continued to be litigated. The number of cases in this area was significant, while some title VII cases are covered in the sections on nontenured faculty, termination of tenured faculty for cause, administration and staff, and sexual harassment. The United States Supreme Court granted certiorari and later dismissed a case alleging gender discrimination in the dismissal of a female campus police officer.[76] The police officer was successful in a federal district court which found that sex discrimination was present in the dismissal but reduced the damage award because the police officer had provided false information on her employment application form.[77] The Sixth Circuit Court of Appeals reversed the decision, finding that the employee's falsification of application records, not gender discrimination, was the basis for the dismissal.[78]

The Third Circuit Court of Appeals affirmed a lower court ruling.[79] The lower court refused to enforce the plaintiff's version of a settlement agreement.[80] The Second Circuit Court of Appeals affirmed a lower court decision in a title VII case.[81] The federal district court had ruled that the doctrine of res judicata barred the plaintiff's salary claim and that the nonsalary claims were barred because they had never been raised with the EEOC.[82]

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[74] Scelsa v. City Univ. of N.Y., 827 F. Supp. 1073 (S.D.N.Y. 1993).

[75] Taylor v. Regents of Univ. of Cal., 993 F.2d 710 (9th Cir. 1993).

[76] Milligan-Jensen v. Michigan Technical Univ., 113 S. Ct. 2991 (1993), *dismissed*, 114 S. Ct. 22 (1993).

[77] *See* The Yearbook of Education Law 1992 at 180, Milligan-Jensen v. Michigan Technical Univ., 767 F. Supp. 1403 (W.D. Mich. 1991).

[78] *See* The Yearbook of Education Law 1992 at 177, Milligan-Jensen v. Michigan Technical Univ., 975 F.2d 302 (6th Cir. 1992).

[79] Bontigao v. Villanova Univ., 980 F.2d 722 (3d Cir. 1992).

[80] *See* The Yearbook of Education Law 1993 at 175, Bontigao v. Villanova Univ., 786 F. Supp. 513 (E.D. Pa. 1992).

[81] Moche v. City Univ., 999 F.2d 538 (2d Cir. 1993).

A New York university employee alleged gender discrimination in the university's failure to appoint her as acting department head, and brought suit under both title VII and title IX.[83] The court found that the EEOC had issued a right to sue letter prematurely (i.e., before the 180-day EEOC investigation and negotiation period had tolled as intended by Congress). The case was remanded to the EEOC for the proper tolling of the waiting period. The court also ruled that a title VII claim does not preclude the right to bring a claim under title IX.

In Colorado, a black instructor sued claiming that he was discriminated against in the termination decision.[84] In a case which has been in and out of court since the termination in 1980, the court found that the doctrine of laches applied to the plaintiff's title VII claim when he waited seven years after the results of his state claim were clear to file this action. Furthermore, the court rejected the application of res judicata to his section 1983 claim because it had been raised in his state court litigation, and held that he was not required to pursue administrative remedies before filing a title VI claim.

An Illinois case involved the shifting burden of proof test to determine whether title VII was violated in the termination of a probationary janitor.[85] While the employee was able to establish a prima facie case of discrimination, the employer was able to show that poor productivity was the reason for the dismissal. The plaintiff failed to show that the reason was a pretext for discrimination.

The award of attorney fees to the prevailing party was also at issue. When a Kansas university employee was successful in her title VII employment discrimination and sexual harassment case,[86] she subsequently sued for attorney fees and expenses.[87] The court ruled that attorney fees need not be reduced because the plaintiff was not successful in all the claims; reasonable fees could exceed basic hourly rates; and paralegal fees were properly billed to the adversary under a title VII sexual harassment claim. In Wisconsin, a state court ruled that a prevailing plaintiff's title VII claim, settled through an institution's internal grievance procedure, did not obligate the institution to pay attorney fees.[88] The court said that this procedure was not the same as EEOC administrative procedures required in a title VII claim where attorney fees can be awarded to the prevailing plaintiff.

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[82] *See* The Yearbook of Education Law 1993 at 176, Moche v. City Univ., 781 F. Supp. 160 (E.D.N.Y. 1992).

[83] Henschke v. New York Hosp.-Cornell Med. Ctr., 821 F. Supp. 166 (S.D.N.Y. 1993).

[84] Subryan v. Regents of Univ. of Colo., 813 F. Supp. 753 (D. Colo. 1993).

[85] Davis v. Illinois Human Rights Comm'n, 615 N.E.2d 1376 (Ill. App. Ct. 1993).

[86] *See* The Yearbook of Education Law 1993 at 176, Campbell v. Board of Regents of Kan., 770 F. Supp. 1479 (D. Kan. 1991).

[87] Campbell v. Kansas State Univ., 804 F. Supp. 1393 (D. Kan. 1992).

[88] Duello v. Board of Regents of Univ. of Wis. Sys., 501 N.W.2d 38 (Wis. 1993).

In a retaliation claim, the plaintiff had been unsuccessful in her original sex discrimination claim.[89] Her husband filed the retaliation claim for both of them as faculty members.[90] Actions of the employer which caused no tangible harm, loss of salary, benefits, or position, were not a violation under title VII (i.e., denying the husband summer teaching of one class, when he was allowed to substitute another, was not retaliation). Also, the judge was not required to be recused because he held a position in the institution as a nonsalaried adjunct professor who allowed law students to intern in federal court.

The Equal Pay Act

A female humanities professor claimed pay and gender discrimination against a Texas university. The district court found that there was no pay disparity based on gender among the humanities faculty where female professors, in fact, were paid more than male professors. The court also ruled that the denial of promotion by a committee dominated by males was not discrimination based on gender. This ruling was affirmed by the Fifth Circuit Court of Appeals.[91] The plaintiff requested a rehearing en banc, arguing that disparate impact, instead of intentional impact, should have been the basis for analysis of her title IX claim.[92] The court denied her request, finding that even if disparate impact had been used, she would have failed in her claim.

In Maryland, a state court found that the plaintiff was unable to establish a prima facie case of discrimination where male and female professors were not performing work of comparable skills or character,[93] and the salary differential was based on a nondiscriminatory merit system. Finally, the time for filing under the Federal Equal Pay Act had tolled since the plaintiff knew her rights to equal pay when she commenced action in state court but failed to file with EEOC.

Age Discrimination in Employment Act (ADEA)

Age discrimination in employment cases were brought in both state and federal courts. Issues ranged from jurisdictional and tolling questions, to decisions on the merits, to cases involving institutional disclosure of information. Mandatory retirement cases leadoff this section. A New York faculty member, [illegible]ed to retire at age seventy, sued, claiming an ADEA violation and a title VII claim for failure to reemploy her in a new position for which she had applied.[94] The court issued summary judgment for the institution on the ADEA claim finding that academic institutions had it within their discretion to require mandatory retirement through the end of 1993. The plaintiff was not able to show irreparable harm pending the determination on the title VII claim to warrant a preliminary injunction. In another mandatory retirement case, the suit was time barred as it was not a continuous violation, but began to toll on the date it became clear that the institution would not provide laboratory space as negotiated in the post-retirement agreement.[95] The court also found that post-retirement research and travel monies were consequential damages that applied only to a claim of retaliation, which was not brought forth in this case.[96]

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[89] *See* The Yearbook of Education Law 1989 at 206, Wu v. Thomas, 847 F.2d 1480 (11th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989).

[90] Wu v. Thomas, 996 F.2d 271 (11th Cir. 1993); *see* The Yearbook of Education Law 1990 at 204, Wu v. Thomas, 863 F.2d 1543 (11th Cir. 1990).

[91] Chance v. Rice Univ., 984 F.2d 151 (5th Cir. 1993).

[92] Chance v. Rice Univ., 989 F.2d 179 (5th Cir. 1993).

[93] Nixon v. State, 625 A.2d 404 (Md. Ct. Spec. App. 1993).

A federal district court ruled that the Eleventh Amendment did not prevent adjudication of an age discrimination claim of a Kansas university employee.[97] A West Virginia court ruled that the determination of no probable cause by a state human rights commission was not adjudication on the merits, blocking action in state court.[98] A Nebraska court ruled that the state had thirty days to appeal the lower court decision and that filing for a new trial did not stop the tolling of the appeal.[99] The Eleventh Circuit Court of Appeals vacated and remanded a lower court judgment notwithstanding the verdict for the institution.[100] The court found that the evidence supported the retaliation claim of the teacher for bringing an age discrimination claim.

A number of cases dealt with the merits of age discrimination claims. An Ohio university employee filed an age discrimination claim over her lateral move to a new position after being passed over for a promotion.[101] The court ruled that the lateral move was not an adverse employment action under the Act because she retained the same title and salary, and she enjoyed the new job. On the promotion question, the court found that the institution's proffered business justification for choosing the younger employee was not a pretext for age discrimination. A typewriter repairman failed to prove an age discrimination claim when he was dismissed after his job was eliminated.[102] The repairman failed to take the retraining offered in electronics and computer repair, and, when a computer repair specialist was hired, the new line was different than that formally held by the plaintiff. A Maryland special administrator in a medical technology program filed claims of race discrimination, age discrimination, and retaliation following his termination and the employer's refusal to rehire.[103] The terminated employee was unable to prove that the reasons for the termination of his position were a pretext for discrimination. He was also unable to demonstrate that he had been retaliated against in the rehiring decisions where he lacked qualifications for both the microbiology professor and administrative positions. However, a Howard University administrator was able to prove discrimination based on age in the failure of the institution to promote him to the vacant director's position.[104] The court found that the institution's reasons, the stronger qualification of the person promoted, were not valid and were, therefore, a pretext for discrimination based on the plaintiff's age.

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[94] Pollis v. New Sch. for Social Research, 829 F. Supp. 584 (S.D.N.Y. 1993).

[95] Moskowitz v. Trustees of Purdue Univ., 5 F.3d 279 (7th Cir. 1993).

[96] *Id.* at 284.

[97] Hurd v. Pittsburg State Univ., 821 F. Supp. 1410 (D. Kan. 1993).

[98] Jones v. Glenville State College, 433 S.E.2d 49 (W. Va. 1993).

[99] Hueftle v. Northeast Tech. Community College Bd. of Governors, 496 N.W.2d 506 (Neb. 1993).

[100] Edwards v. Board of Regents of Univ. of Ga., 2 F.3d 382 (11th Cir. 1993).

[101] Kauffman v. Kent State Univ., 815 F. Supp. 1077 (N.D. Ohio 1993).

Finally, a New York college employer who lost a claim before the Department of Human Rights sued the Department after it disclosed the details of the settlement.[105] The court ruled in favor of the college in all areas not covered by the state open meeting laws, and found that the Department had acted arbitrarily and capaciously in the disclosure. The Human Rights Department argued that it had to disclose the settlement to inform other employees of their rights.

Rehabilitation Act of 1973 and Americans with Disabilities Act (ADA)

One case under ADEA dealt with the award of attorney fees and costs. The court ruled that the unsuccessful claim brought by a student was not frivolous and denied the award of attorney fees to the institution.[106] However, lack of funds would not preclude the award of costs to the institution.

A federal district court ruled that a private right of action existed in an ADA claim.[107] The court found that it was not necessary to exhaust administrative remedies with EEOC before bringing this action. The ambiguity of the Act and the regulations left both the administrative remedy through EEOC and the private right of action in court available.

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[102] Thibodeaux v. Lamar Univ., 805 F. Supp. 21 (E.D. Tex. 1992), *aff'd*, 3 F.3d 437 (5th Cir. 1993).

[103] Moore v. Reese, 817 F. Supp. 1290 (D. Md. 1993).

[104] Ware v. Howard Univ., 816 F. Supp. 737 (D.C. Cir. 1993).

[105] Paul Smith's College of Arts & Sciences v. Cuomo, 589 N.Y.S.2d 106 (N.Y. App. Div. 1992).

[106] Halasz v. University of New England, 821 F. Supp. 40 (D. Me. 1993).

[107] Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276 (W.D. Wis. 1993).

Hiring Discrimination

In a unique case, a hired assistant professor, the chair of the search committee, and the provost brought charges of defamation against a private citizen.[108] The private citizen claimed discrimination in hiring and released the transcripts of the hired assistant professor. The court found that the assistant professor was neither a public official nor a "voluntary limited purpose public figure," but that the transcript was a matter of public concern, not a private fact shielded from disclosure. A decision is pending on the merits of the assistant professor's claim.

A Minnesota veteran was successful in claiming the application of the Veterans Preference Act.[109] The veteran must be given both points for veteran status and reasons for rejection of his application. However, the state supreme court reversed, ruling that the University of Minnesota, a constitutional corporation with authority vested in the Board of Regents, was not a political subdivision of the state for purposes of the Veterans Preference Act.[110] A North Carolina applicant was unable to show that she was more qualified than the person hired, negating any claim as a state employee under state law.[111]

Faculty Employment

Faculty in tenure track positions but without tenure (probationary faculty) continue to litigate questions involving First Amendment violations, nonrenewal of contracts, and denial of tenure.

First Amendment Speech

A Puerto Rican probationary faculty member brought claims of First Amendment, substantive due process, and libel-slander violations surrounding the decision to deny him tenure and his removal as director of The Seismic Network.[112] The associate professor had made statements on a radio program about the hazard of building an electric power plant on a seismic fault. The court, finding First Amendment and substantive due process violations, ordered him reinstated and a subsequent tenure review by a six-person committee from outside the university.[113] Ruling on postorder motions, the court found its order adequate to remedy a First Amendment violation, but the plaintiff could not recover damages on the substantive due process claim.

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[108] Grossman v. Smart, 807 F. Supp. 1404 (C.D. Ill. 1992).

[109] *See* THE YEARBOOK OF EDUCATION LAW 1993 at 202, Winberg v. University of Minn., 485 N.W.2d 325 (Minn. Ct. App. 1992).

[110] Winberg v. University of Minn., 499 N.W.2d 799 (Minn. 1993).

[111] Teague v. Western Carolina Univ., 424 S.E.2d 684 (N.C. Ct. App. 1993).

[112] McCann v. Ruiz, 802 F. Supp. 606 (D.P.R. 1992).

A New York law professor brought First Amendment speech and Fourteenth Amendment due process claims following his denial of tenure.[114] The professor, who published articles advocating the legalization of marijuana, agreed to delay the tenure review until his seventh year because of a need to improve his scholarship and teaching. He received a seventh-year contract, with the stipulation that it would be a terminal contract if he was not awarded tenure that year. The professor claimed de facto tenure and due process violations over the university's failure to review him in his sixth year. The court found that he was not likely to prevail on any of the claims. In another claim, he was denied access to the unrelated tenure files of a female professor who, he maintained, received tenure because of nepotism.[115] In a related decision, the court ruled that other means of discovery of information were not exhausted before the law professor sought access to a tape recorded interview of the school's dean with a student newspaper reporter.[116]

Nonrenewal Decisions

Two types of nonrenewal procedures exist. One is simply to choose not to renew the contract of a probationary faculty member prior to the tenure review (nonrenewal); the other is to decide after a review not to award tenure (denial of tenure).

Nonrenewal. Cases involving the nonrenewal of a probationary faculty member's contract usually involve the terms of the contract, notification requirements, or breach of contract claims. A Washington university employee held both an "at will" administrative position and a nonsalaried probationary faculty position.[117] The existence of the probationary faculty position did not require due process when he was terminated from his at will administrative position. A community college teacher failed to prove that he came under the contract provisions of the district's contract governing the award of tenure to elementary and secondary teachers.[118]

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[113] *See* THE YEARBOOK OF EDUCATION LAW 1993 at 180, McCann v. Ruiz, 788 F. Supp. 109 (D.P.R. 1992).

[114] Blum v. Schlegel, 830 F. Supp. 712 (W.D.N.Y. 1993).

[115] Blum v. Schlegel, 150 F.R.D. 38 (W.D.N.Y. 1993).

[116] *Id.* at 42.

[117] Janos v. University of Wash., 851 P.2d 683 (Wash. Ct. App. 1993).

[118] Talley v. Flathead Valley Community College, 857 P.2d 701 (Mont. 1993).

A Louisiana court ruled that the notification of nonrenewal of a probationary faculty member's contract was timely even though it failed to meet the requirements of the faculty handbook.[119] The court ruled that the faculty handbook was not incorporated into the employment contract. A North Carolina court ruled that the faculty member was a fixed-term employee, not a probationary faculty member, and could not claim access to the notification requirements under the probationary contract.[120]

A Virginia institution had either a nonrenewal option or a dismissal option for probationary faculty.[121] The state supreme court ruled that the probationary faculty member had been dismissed, requiring due process, which would support a breach of contract claim. The case was remanded for a determination on the merits. An Ohio court ruled that letters defining the tenure decision as coming at the award of a contract after the second three-year contact superseded the probationary faculty member's original employment letter.[122]

The Tenth Circuit Court of Appeals reversed and remanded a lower court summary judgment.[123] The court found that a probationary faculty member had a contract requiring due process prior to termination. The institution issued a contract and attempted to add performance objectives after the agreed upon deadline for adding performance objectives had expired. A Florida appellate court remanded a case finding that the board had sole contracting authority which it had used in awarding the plaintiff a contract for the next year.[124] A decision is pending on the merits of the breach of contract claim when the president withdrew the contract due to low enrollments. Similarly, an Alabama court remanded a case where the faculty member was terminated, ordered reinstated by a college panel, and refused reinstatement by the president.[125] Finally, a Nebraska private university probationary faculty member entered into a settlement agreement which allowed him to maintain a laboratory at the university for one year.[126] He claimed a breach of contract when he returned from a trip to find that research samples were destroyed when the refrigerator was unplugged. The state supreme court affirmed the summary judgment for the university on his breach of contract claim, finding that new evidence could and should have been discovered by the plaintiff at the time of the summary judgment hearing.

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[119] Marson v. Northwestern State Univ., 607 So. 2d 1093 (La. Ct. App. 1992).
[120] Black v. Western Carolina Univ., 426 S.E.2d 733 (N.C. Ct. App. 1993).
[121] Fun v. Virginia Military Inst., 427 S.E.2d 181 (Va. 1993).
[122] Levy v. University of Cincinnati, 616 N.E.2d 1132 (Ohio Ct. App. 1992).
[123] Calhoun v. Gaines, 982 F.2d 1470 (10th Cir. 1992).
[124] Ashcraft v. District Bd. of Trustees of Valencia Community College, 615 So. 2d 271 (Fla. Dist. Ct. App. 1993).
[125] Williams v. Ward, 612 So. 2d 489 (Ala. Civ. App. 1992).
[126] Hansl v. Creighton Univ., 497 N.W.2d 63 (Neb. 1993).

Denial of Tenure. Failure, in a denial of tenure letter, to give the plaintiff thirty days to appeal or state that this was the final decision, as required by law, precluded the use of the law to bar litigation.[127] An Oklahoma probationary faculty member had no property right to an award of tenure.[128] The court also ruled that an independent evaluation of the candidate's scholarship by an independent committee, a departure from the normal procedure, was not a breach of contract.

Several denial of tenure claims involved violations of civil rights or federal statutes. A Texas probationary faculty member was not able to bring a civil rights claim under The Veterans Reemployment Act but awaits adjudication on the merits of his First Amendment claim.[129] The plaintiff alleged that employment decisions were based on his position in favor of the Gulf War. The First Circuit affirmed a lower court decision that a probationary faculty member's title VII claim was time barred.[130] Although he claimed that he was denied tenure because of his race, he neglected to file a claim within 300 days of the denial of tenure decision. The probationary faculty member failed to prove a continuing violation because of actions of the school, including a request to vacate his office the day after his contract ended. The Seventh Circuit Court of Appeals ruled that a female faculty member's title VII claim began tolling from the date of the dean's letter denying the award of tenure, not from the date of the provost's letter advising her that he would not reverse the dean's decision.[131] The court found the dean's decision to be pivotal under the school's tenure policy requiring the commencement of the tolling period.

Tenured Faculty

Termination for Cause. Tenured faculty continue to be terminated for cause resulting in claims alleging violations of constitutional and contractual rights. The constitutional claims center on issues of violations of rights to due process, freedom of speech, and privacy. Other cases deal with the appropriateness of the alleged cause for termination as defined by school policy and supported by the evidence.

A due process violation was alleged in the termination of a Michigan tenured faculty member who was accused of making sexual advances to female students.[132] A hearing committee recommended dismissal, but the president recommended, and the board approved, a one-year suspension

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127. Skudrzyk v. Reynolds, 856 P.2d 462 (Alaska 1993).
128. Stern v. University of Okla. Bd. of Regents, 841 P.2d 1168 (Okla. Ct. App. 1992).
129. Grady v. El Paso Community College, 979 F.2d 1111 (5th Cir. 1992).
130. Kassaye v. Bryant College, 999 F.2d 603 (1st Cir. 1993).
131. Lever v. Northwestern Univ., 979 F.2d 552 (7th Cir. 1992).
132. Wexley v. Michigan State Univ., 821 F. Supp. 479 (W.D. Mich. 1993).

without pay and the acquisition of psychiatric help. The faculty member resigned and sued. A federal district court ruled that due process did not require a hearing at every decision point. Due process was not violated when the president refused to hold a hearing before he rendered his decision. The court also found that the plaintiff had failed to establish a prima facie case of discrimination based on his religion. A Pennsylvania faculty member terminated for sexual harassment brought his own sexual harassment claim against the complaining employee.[133] The court found no basis for his claim or the claim that the institution had a two-tiered disciplinary system to handle sexual harassment claims based on the gender of the person bringing the claim.

An Alaska court ruled that the Administrative Procedures Act (APA) governs the due process procedures to be followed in a pretermination hearing of a faculty member at the university.[134] Allowing legal counsel to advise the faculty member, but not question witnesses giving testimony, was insufficient to meet the due process requirements under APA. A South Carolina court ruled that the state APA did not allow for an action of discovery available under the Rules of Civil Procedures.[135] The plaintiff had attempted to discover communications between the institution's legal counsel and the vice president for academic affairs. This decision vacated a lower court contempt order against the university.

Constitutional issues were encountered in faculty termination cases. A terminated theological seminary tenured faculty member sued alleging violations of First and Fourteenth Amendment rights.[136] The Texas court ruled that First Amendment religious protections prohibited the court from delving into ecclesiastical matters of a religious organization.

A terminated New Mexico faculty member claimed that his First Amendment speech protections were violated in the decision to terminate.[137] He alleged that the termination resulted from his whistle blowing over grade fraud at the institution. The Tenth Circuit Court of Appeals affirmed the lower court denial of summary judgment to the university based on qualified immunity. The court found that grade fraud was a matter of public concern and that whistle blowing negated the qualified immunity claim.

The types of causes involved in termination were again evaluated by the courts. A North Carolina faculty member was terminated for conduct which allegedly rendered him unfit to be a faculty member.[138] The court found that the university's action was arbitrary and capricious when it decided to address behavior occurring over the last thirteen years without evidence of addressing these behaviors at the time of their occurrence. In an earlier decision, the court found that the plaintiff needed to exhaust administrative remedies before filing his breach of contract claim.[139]

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[133] Grassinger v. Welty, 818 F. Supp. 862 (W.D. Pa. 1992).

[134] Odum v. University of Alaska, Anchorage, 845 P.2d 432 (Alaska 1993).

[135] Ross v. Medical Univ. of S.C., 435 S.E.2d 877 (S.C. Ct. App. 1993).

[136] Patterson v. Southwestern Baptist Theological Seminary, 858 S.W.2d 602 (Tex. Ct. App. 1993).

[137] Powell v. Gallentine, 992 F.2d 1088 (10th Cir. 1993).

[138] Huang v. North Carolina State Univ., 431 S.E.2d 541 (N.C. Ct. App. 1993).

An irate faculty member grabbed the shirt of a coordinator and threatened to "put a gun to the head of the next person who treated his people in that manner."[140] He was terminated on the grounds of immorality and persistent negligence. The court found that these incidents did not rise to the level of persistence necessary to terminate his contract.

Poor teaching, based on performance evaluations by a faculty committee, was the basis for the termination of a District of Columbia faculty member.[141] The court found that the reasons for termination were neither a pretext for discrimination under title VII nor retaliation for previous discrimination claims.

Selling illegal drugs served as the basis of the dismissal of several faculty. A California court upheld a community college's termination of a faculty member as unfit to teach when he was found to have sold illegal drugs to students at the college.[142] An Iowa court upheld a community college's termination decision resulting from a faculty member knowingly allowing the sale of illegal drugs to take place in her home.[143]

The award of damages was also scrutinized by the courts. A faculty member of a Colorado institution prevailed in his illegal termination claim. The court ruled that damages could include prejudgment interest, but that interest should not be applied to postponement loss of future wages.[144]

Denial of Employee Privilege. Cases involving employee privilege included a case over the denial of promotion to full professor.[145] An unsuccessful candidate for promotion sought access to various documents in his dossier under the Freedom of Information Act. The New York court ruled that the information sought and the deliberations and decisions of each of the committees involved in the promotion and tenure process, was advisory in nature and was used to aid the board in its final decision. The court found this material not to be accessible under the Act.

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[139] Huang v. North Carolina State Univ., 421 S.E.2d 812 (N.C. Ct. App. 1992).

[140] Horton v. Jefferson County-DuBois Area Vocational Tech. Sch., 630 A.2d 481 (Pa. Commw. Ct. 1993).

[141] Dhuria v. Trustees of Univ. of D.C., 827 F. Supp. 818 (D.C. 1993).

[142] West Valley-Mission Community College Dist. v. Concepcion, 21 Cal. Rptr.2d 5 (Cal. Ct. App. 1993).

[143] Board of Directors of Des Moines Area Community College v. Simons, 493 N.W.2d 879 (Iowa Ct. App. 1992).

[144] Shannon v. Colorado Sch. of Mines, 847 P.2d 210 (Colo. Ct. App. 1992).

[145] Rothenberg v. City Univ. of N.Y., 594 N.Y.S.2d 219 (N.Y. App. Div. 1993).

In a Missouri case, a faculty member alleged that she was removed as department head in retaliation for filing a sex discrimination claim in denial of tenure and promotion in 1986.[146] She alleged that her removal was also based on age and gender discrimination. A federal district court ruled that the dean and chairperson were not employees as defined by ADEA. The court also ruled that the title VII charge, not present in the original complaint filed with EEOC, must be dismissed but that immunity did not shield the defendant from a tortious interference claim.

Termination for Financial Exigency. A summary judgment in favor of the institution was reversed in part by a state appellate court.[147] The court found that material issues existed in a question of whether a professor could claim a vacant position for which he may be qualified under the institution's financial exigency policies. The faculty member's assigned courses were to be discontinued, but the faculty member had not been terminated when the new position search was commenced. A decision on the merits is pending.

Administrators and Staff

Administrator and Staff Terminations

Litigation in this section deals with the termination of administrators and staff. Claims dealt with constitutional violations, discrimination, or employer actions which violated federal statutes. Issues surrounding the employment contract were also at bar along with violations of state law.

The leadoff case is a case many are familiar with because it was featured on the cable television court channel.[148] The Chair of the Black Studies Department at the City University of New York was removed from his position after giving several speeches that were considered anti-Semitic. While the institution claimed that he was removed for incompetence in the performance of his duties, he had been recently awarded a three-year contract based on good performance. A federal district court upheld the jury verdict, finding that his speech was the motivating factor in his removal. The court noted that the university could have used the argument that consequences of the speech were disruptive to campus classes, fund raising, or faculty relations, or that the professor had turned his classroom into a racist and pseudo-thinking environment, but failed to do so. The court stated that:

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[146] Kizer v. Curators of Univ. of Mo., 816 F. Supp. 548 (E.D. Mo. 1993).
[147] Lipp v. State, 843 P.2d 41 (Colo. Ct. App. 1992).
[148] Jeffries v. Harleston, 828 F. Supp. 1066 (S.D.N.Y. 1993).

> We are, accordingly, required to uphold the jury verdict on the professor's First Amendment claim, and the related punitive damage award made by the jury in justifiable disgust with the conduct of the University officials who did not act, then acted for the wrong reasons, then were dishonest about their motivation in testimony before the jury.[149]

A number of termination cases raised questions of jurisdiction. The Eleventh Circuit Court ruled that the termination of a nurse by a private, nonprofit medical service corporation was not "state action."[150] The court noted that the county hospital authority's hold harmless clause negated the private hospital's claim as an agent of county government. An Illinois basketball coach was unable to show that his resignation was coerced by the institution.[151] A California court ruled that a religiously affiliated institution, which terminated a pregnant employee for having sexual intercourse outside of marriage, was exempt from the State Fair Employment and Housing Act.[152]

Constitutional violations in the termination of administrators and staff were alleged in several cases. The alleged violations of liberty and property interests of the terminated vice president of an Alabama institution have yet to be adjudicated on the merits.[153] Again on appeal, the Eleventh Circuit Court of Appeals found that Eleventh Amendment immunity extended to the president and trustees in their official capacity. Also, qualified immunity in their individual capacity existed on the liberty interest claim but not the property interest claim.[154] An Oklahoma college department chair's due process was not violated, nor was she coerced into resigning, when she was given the option of either facing a termination hearing for employing her daughter as a part-time instructor or resigning.[155]

Violations of First Amendment protected speech were alleged in a number of termination cases. A terminated college president could not show that private statements on matters of public concern, found to be protected speech, were the motivating factors in his termination.[156] The court also found that the president was an at will employee without a property right in the position. In another case involving a college president, the court found that political disagreements between the president and the board were not conduct protected by the First Amendment because the president's duties in relation to the board outweighed his speech protections as a private citizen on matters of public concern.[157] In another case, a federal court found that the content, form, and context of the plaintiff's speech did not raise it to the level of protected speech on matters of public concern.[158]

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[149] *Id.* at 1072.

[150] Willis v. University Health Servs., 804 F. Supp. 1557 (S.D. Ga. 1992), *aff'd*, 993 F.2d 837 (11th Cir. 1993).

[151] Griffin v. Triton College, 822 F. Supp. 1322 (N.D. Ill. 1993).

[152] Arriaga v. Loma Linda Univ., 13 Cal. Rptr.2d 619 (Cal. Ct. App. 1992).

[153] *See* THE YEARBOOK OF EDUCATION LAW 1990 at 217, Lassiter v. Covington, 861 F.2d 680 (11th Cir. 1989).

[154] Lassiter v. Alabama A & M Univ. Bd. of Trustees, 3 F.3d 1482 (11th Cir. 1993).

[155] Parker v. Board of Regents of Tulsa Junior College, 981 F.2d 1159 (10th Cir. 1992).

A Missouri court found that an employee was retaliated against by termination.[159] The exception, allowing the application of retaliatory discharge to an at will employee's termination, was because his position required public policy enforcement through disclosure of infractions against the Animal Welfare Act.

The nature of employment contracts was pivotal in terminated employees' claims before the courts. At will employees do not possess a property right or the right to certain procedural obligations of other institutional employees.[160] The termination of an at will employee, because of his religious affiliation, by a private religious college was not discrimination based on religion.[161] Finally, the demotion of a department chair was not retaliatory discharge since the plaintiff still held his faculty position at the medical school.[162]

The scope of a contract was litigated in the case of a terminated administrator.[163] The contract clearly provided that the administrative position was not subject to the institution's policy on the award of tenure. An employee whose one-year contract was not renewed, did not have an implied covenant to have her contact renewed.[164] The court found that a written contract always takes precedence. A Washington court found that the terminated employee was still a probationary employee at the time of termination because unpaid leave days add to the time of the probationary period.[165] The court ruled that the procedures for a permanent employee under the contract were not required in this case. A former college coach could not substantiate the existence of an oral agreement to rehire him.[166] An Iowa court found that an institution was procedurally correct in its decision not to reclassify the secretarial position under the comparable worth guidelines set out for state institutions.[167] Finally, in a termination case where damages were awarded,[168] there was no aggrieved party where the plaintiff agreed to a damage award.[169]

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[156] Idoux v. Lamar Univ. Sys., 817 F. Supp. 637 (S.D. Tex. 1993).

[157] Heath v. Highland Park Sch. Dist., 800 F. Supp. 1470 (E.D. Mich. 1992).

[158] Hartman v. Board of Trustees of Community College Dist. No. 508, Cook County Ill., 4 F.3d 465 (7th Cir. 1993).

[159] Luethans v. Washington Univ., 838 S.W.2d 117 (Mo. Ct. App. 1992).

[160] Dunfey v. Roger Williams Univ., 824 F. Supp. 18 (D. Mass. 1993); Mix v. University of New Orleans, 609 So. 2d 958 (La. Ct. App. 1992); Whitehead v. University of Tex. Health Science Ctr. at San Antonio, 854 S.W.2d 175 (Tex. Ct. App. 1993).

[161] Scheiber v. St. John's Univ., 600 N.Y.S.2d 734 (N.Y. App. Div. 1993).

[162] Hindo v. University of Health Sciences/Chicago Med. Sch., 604 N.E.2d 463 (Ill. App. Ct. 1992).

[163] Harford v. University of Minn., 494 N.W.2d 903 (Minn. Ct. App. 1993).

[164] Farris v. Hutchinson, 838 P.2d 374 (Mont. 1992).

[165] University of Wash. v. Jacobs, 842 P.2d 971 (Wash. Ct. App. 1992).

Collective Bargaining

Collective bargaining issues included the right to organize, the membership of the bargaining unit, unfair labor practice claims, and arbitration procedures and findings. A Vermont college challenged the ruling of a state labor relations board that adjunct faculty could be represented by the same union representing faculty.[170] The court ruled that a separate bargaining unit of adjunct faculty, within the same union representing full-time faculty, was not a conflict of interest prohibiting representation by the union. The court also found that adjunct faculty not currently teaching at the college were eligible to vote on the petition to organize.

Designation of the membership of a bargaining unit was also before the courts. In a somewhat unique case, the faculty union was to hold elections for officers but postponed them when only one candidate ran for president.[171] The original solo candidate, who lost the election in a run off after several other candidates came forward, sued the union alleging discrimination based on race and national origin. The court, issuing a summary judgment for the union, found that the union was a private entity with sole regulatory power emanating from the commerce clause, and that the position of president was not a position of employment as defined by title VII.

In another membership dispute, a small community college attempted to bring nonfaculty employees into the bargaining unit.[172] The state court reversed the labor relations board ruling (denying nonfaculty

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166. Dickens v. Quincy College Corp., 615 N.E.2d 381 (Ill. App. Ct. 1993).
167. Sindlinger v. Iowa State Bd. of Regents, 503 N.W.2d 387 (Iowa 1993).
168. *See* THE YEARBOOK OF EDUCATION LAW 1992 at 176, Parkin v. Cornell Univ., 562 N.Y.S.2d 1013 (N.Y. App. Div. 1990); 569 N.Y.S.2d 610 (1991); *see* THE YEARBOOK OF EDUCATION LAW 1993 at 189, Parkin v. Cornell Univ., 577 N.Y.S.2d 227 (N.Y. 1991).
169. Parkin v. Cornell Univ., 588 N.Y.S.2d 821 (N.Y. 1992).
170. Vermont State Colleges Faculty Fed., AFT Local 3180 v. Vermont State Colleges, 616 A.2d 221 (Vt. 1992).
171. Saini v. Bloomsburg Univ. Faculty, 826 F. Supp. 882 (M.D. Pa. 1993).
172. Sandburg Faculty Ass'n, IEA-NEA v. Illinois Educ. Labor Relations Bd., 618 N.E.2d 989 (Ill. App. Ct. 1993).

membership in the faculty bargaining unit), finding that the "community of interest analysis" should yield a finding of common interest between faculty and nonfaculty employees given the small size of the bargaining unit.

Nonmember obligations to the collective bargaining unit centered on the payment of fees. A New Jersey court ruled that the collection of a portion of union dues, which was used for political activity, could not hinge on whether the nonunion members objected to that portion of the fee.[173] The portion of union fees used for political activities must be deducted from all nonmembers' fees.

Union negotiations on promotion and tenure policies which hamper the school's decision making prerogatives were held to be unfair labor practices because they interfered with a management prerogative;[174] that decision was affirmed by the New Jersey Supreme Court.[175] An Illinois court found it to be an unfair labor practice to negotiate to impasse by attempting to exclude nonexcludable subjects (i.e., discharge, demotion, position classification, and discrimination) from the grievance procedure.[176] Another Illinois court found that it was not an unfair labor practice for the union to attempt to arbitrate a matter excluded from arbitration under the collective bargaining agreement.[177] It is within the realm of expertise of the labor relations board, as the determiner of labor relations policy, to expressly rule that attempting to arbitrate an unarbitrable grievance is not an unfair labor practice because it promotes arbitration.

Grievance procedures were at issue in a New York case.[178] The union that brought the grievance of a dismissed graduate assistant, but not the graduate assistant, had standing to litigate in a challenge to the arbitrator's decision. A federal district court ruled that a private New York university had agreed to arbitrate disputes, dismissing this breach of contract claim. The court held that the institution must arbitrate a breach of the "no strike clause" in the collective bargaining agreement; that the claim before the court was not frivolous; and that the claim was "supported by a colorable interpretation of the agreement" (i.e., the language regarding "employee arbitration" and "without waiving its statutory rights").[179]

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[173] New Jersey Educ. Ass'n v. New Jersey Pub. Employment Relations Comm'n, 628 A.2d 789 (N.J. Super. Ct. App. Div. 1993).

[174] *See* THE YEARBOOK OF EDUCATION LAW 1993 at 187, Rutgers v. Rutgers Council of AAUP Chapters, 606 A.2d 822 (N.J. Super. Ct. App. Div. 1992).

[175] Rutgers State Univ. v. Rutgers Council of AAUP Chapters, 618 A.2d 853 (N.J. 1993).

[176] Board of Trustees of the Univ. of Ill. v. Illinois Educ. Labor Relations Bd., 612 N.E.2d 1365 (Ill. App. Ct. 1993).

[177] Board of Trustees of Community College Dist. No. 502 v. Illinois Educ. Labor Relations Bd., 608 N.E.2d 950 (Ill. App. Ct. 1993).

[178] Katir v. Columbia Univ., 821 F. Supp. 900 (S.D.N.Y. 1993).

The scope of an arbitrator's decision was not exceeded when he found that an employee's duties exceeded her half-time pay and fringe benefits under the terms of the collective bargaining agreement.[180] Plaintiffs who unsuccessfully challenged a union decision of a reduced service fee for 1991-92 through arbitration, came under the three-year statute of limitations, not the twenty-one day statute of limitations for arbitration decision challenges.[181]

Employee Benefits

Issues regarding various employee benefits (e.g., retirement, health care and other insurance, disability, vacation) were in the courts in 1993. The leadoff case involved an attempt by Oregon to increase revenues by taxing payments paid under the State Public Employee's Retirement Act.[182] The decision was based on a Supreme Court ruling, *Davis v. Michigan Department of Treasury*,[183] which found that when states exempt state retirement benefits from taxation, they must also exempt federal retirement benefits. On this challenge to the state's 1991 repeal of state employees' retirement exemption from taxation, the court found that the repeal did not impair the contract between the state and public employees, but that the state could not impose a tax on payments for work performed prior to the repeal of the tax exemption. Maine, in 1991, changed its retirement system to exclude from "earnable compensation" unused leave for sickness and vacations, and raised the minimum age to receive full benefits to sixty-two.[184] The state supreme court ruled that the establishment of the pension benefits program for public employees did not establish a contractual obligation; therefore, modifications did not violate the public employees' constitutional rights. Furthermore, the court ruled that due process was not violated when the legislature enacted the modifications. The West Virginia Supreme Court affirmed a lower court decision denying a request to require the state retirement system to give state college and university employees credit for prior service in higher education when the employees had made no contribution to the state retirement system.[185]

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[179] Trustees of Columbia Univ. v. Local 1199, Drug, Hosp. & Health Care Employees Union, 805 F. Supp. 216 (S.D.N.Y. 1992).

[180] State v. United Univ. Professions, 589 N.Y.S.2d 705 (N.Y. App. Div. 1992).

[181] Bromley v. Michigan Educ. Ass'n-NEA, 815 F. Supp. 220 (E.D. Mich. 1993).

[182] Hughes v. State, 838 P.2d 1018 (Or. 1992).

[183] Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989).

[184] Spiller v. State, 627 A.2d 513 (Me. 1993).

[185] Nesselroad v. Ansel, 423 S.E.2d 596 (W. Va. 1992).

Individual claims for retirement were also litigated. A Pennsylvania court ruled that the annuity contract could not become part of a debtor's estate for collection purposes, but that the annuity could make the agreed monthly payments to the debtor's estate.[186] A state employee, who received a settlement in salary for a grievance filed, challenged the way the settlement was parceled out to calculate his final average salary for retirement purposes.[187] The court ruled that it was appropriate to distribute the salary over the time it would have been earned rather than the quarter it was paid to the employee. A retired employee who, through an exception, was reemployed by a community college while receiving full retirement benefits, was not entitled, in the new job, to the employer's contribution to the retirement benefits program.[188]

Disability benefits were at issue in a case involving an injured maintenance employee.[189] The court ruled that the retirement system was entitled to reimbursement for disability benefits paid with the understanding that they would be reimbursed when a workmen's compensation settlement was received. Therefore, after receipt of the settlement by the employee, the retirement system could withhold retirement benefits until reimbursement was received. A Missouri university could not, under the Federal Employee Retirement Income Act, exclude the three years an employee was a graduate assistant toward the accumulation of service to be eligible under the school's pension plan.[190] A North Carolina court ruled that the teachers' retirement and local government systems could exempt "years of military service" from "years of service" in order to purchase service credits at a reduced rate.[191] In Pennsylvania, the court ruled that the state retirement system could decide that money paid under a management incentive program, developed for executive employees by the Pennsylvania Higher Education Assistance Agency, was not compensation for retirement purposes.[192]

Issues were also litigated over insurance benefits. In a case involving the payment of an insurance annuity decided for the widower of a deceased employee,[193] the court awarded the payment of attorney fees to the widower.[194] In a California preliminary ruling, a widower, who elected to continue under the college's health care plan, was granted the right to amend his complaint to include the Public Health Services Act in a claim involving payments for medical expenses incurred by the widower after his spouse's death.[195]

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[186] *In re* Kelvington, 146 B.R. 358 (Bankr. W.D. Pa. 1992).

[187] Miller v. State Employees' Retirement Sys., 626 A.2d 679 (Pa. Commw. Ct. 1993).

[188] Harckham v. Clark, 593 N.Y.S.2d 392 (N.Y. Sup. Ct. 1992).

[189] Hannigan v. Hoffmeister, 608 N.E.2d 396 (Ill. App. Ct. 1992).

[190] Weber v. St. Louis Univ., 804 F. Supp. 1141 (E.D. Mo. 1992).

[191] Worrell v. North Carolina Dep't of State Treasurer, Retirement Sys. Div., 427 S.E.2d 871 (N.C. 1993).

[192] Commonwealth, Higher Educ. Assistance Agency v. State Employees' Retirement Bd., 617 A.2d 93 (Pa. Commw. Ct. 1992).

[193] Mendez v. Teachers Ins. & Annuity Ass'n, 789 F. Supp. 139 (S.D.N.Y. 1992).

[194] Mendez v. Teachers Ins. & Annuity Ass'n, 982 F.2d 783 (2d Cir. 1992).

An employees' association was successful in claiming that the three days of thanksgiving proclaimed by the President of the United States at the end of the Gulf War were holidays under their employment contract.[196] An Ohio court ruled that it was a breach of contract to retroactively apply a vacation day accrual policy to vacation days accumulated prior to the policy becoming official.[197] A Louisiana state university employee was unable to establish a right to a housing and utilities allotment, which was terminated at the end of the contract period.[198] A West Virginia court ruled that as long as the employee conformed to the institution's policies for full-time faculty duties and outside activities, he could not be prohibited from "moonlighting."[199] Finally, a terminated employee who worked irregular hours met the hours worked requirement to be eligible for unemployment compensation.[200]

Sexual Harassment

The number of cases involving claims of sexual harassment under title VII or state laws has grown considerably over the past few years. Title VII claims of a hostile work environment, quid pro quo, or retaliation are the three main types brought before the court. The Seventh Circuit Court of Appeals found that lost wages resulting from psychological distress occurring three years after a sexual assault was causally related to support a title VII claim and remanded the case for adjudication on the merits.[201]

A student who had an intimate relationship with an art professor claimed that after the affair was terminated, the professor treated her in an unprofessional manner, gave her lower grades, and exhibited demeaning behavior and criticism of her work, causing personal injury.[202] The court found that her sexual harassment claim under title VII was time barred. The court also found that the other allegations were not sufficient to maintain a sexual harassment claim. A beauty college instructor's charge of sexual harassment and constructive discharge under state

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195. Moran v. Peralta Community College Dist., 825 F. Supp. 891 (N.D. Cal. 1993).
196. California Sch. Employees Ass'n v. Marin Community College Dist., 19 Cal. Rptr.2d 572 (Cal. Ct. App. 1993).
197. Batra v. Wright State Univ., 616 N.E.2d 1137 (Ohio Ct. App. 1992).
198. Leger v. Louisiana State Univ. Agric. Ctr., 607 So. 2d 744 (La. Ct. App. 1992).
199. Graf v. West Virginia Univ., 429 S.E.2d 496 (W. Va. 1992).
200. Shoreline Community College Dist. No. 7 v. Employment Sec. Dep't, 842 P.2d 938 (Wash. 1992).
201. Townsend v. Indiana Univ., 995 F.2d 691 (7th Cir. 1993).
202. Ruh v. Samerjan, 816 F. Supp. 1326 (E.D. Wis. 1993).

law was barred by two statutes of limitations.[203] A federal district court ruled that a Wyoming technical school was not eligible to receive a summary judgment in a title VII sexual harassment case because the supervisor made harassing comments to employees of both genders.[204]

A Puerto Rican title VII claim was held in abeyance.[205] After her divorce, the plaintiff's supervisor began to make advances toward her culminating in an incident in a storeroom which resulted in her not returning to her job. After complaints were filed internally and the results of that investigation found no impropriety on the part of the supervisor, the institution terminated the employee for not reporting to work. The court held that both the sexual harassment and retaliation claims should be held in abeyance until it could be determined whether all administrative remedy prerequisites to sue had been satisfied.

In a New York case the plaintiff, a student, commenced a relationship with a university employee prior to his employment at the university.[206] When he took a job with the school, he hired her in the telemarketing program of the development office. The plaintiff charged that the school knew of this abusive relationship but failed to take action. The court dismissed the claim because the plaintiff knew that she had consulted with a confidential sexual harassment panel, which could not release the information to university officials, based on her request. As soon as she informed university officials, they took immediate action and eventually terminated the employee. The court also noted that discontinuing the telemarketing program for economic reasons was not retaliation for her complaint.

An assistant director of a women's studies program brought a hostile work environment claim against the director of the women's studies program and the institution.[207] On several occasions, the director of the program made sexual advances toward the plaintiff. Later, after the director was transferred to another academic unit, the plaintiff observed her making sexual advances to female students and staff. The court found that the observation of sexual advances made to others by the ex-director did not create a continuing hostile work environment for the plaintiff, and that her claim was time barred. Furthermore, the action of not appointing her as the new director of women's studies was not retaliation for filing the complaint, even though three members of the search committee said that her past history with the program was a detriment.

A college's public security officer sued the institution for quid pro quo and hostile work environment sexual harassment claims.[208] The plaintiff had an intimate relationship with the chief of security which she later terminated. She claimed that during and after the affair, she was harassed and punished by the defendant supervisor. The court found that the alleged harassment was actually work related actions meted out to a number of employees for work infractions and, therefore, would not maintain the hostile work environment claim. It then remanded the quid pro quo claim for adjudication. In New York a black male affirmative action officer who terminated an intimate relationship with his supervisor was unable to maintain a quid pro quo sexual harassment claim.[209] The actions taken against him, which resulted in his termination, were based on job performance and not related to the relationship with his supervisor.

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[203] Harmon v. Higgins, 426 S.E.2d 344 (W. Va. 1992).
[204] Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334 (D. Wyo. 1993).
[205] Silva v. Universidad de P.R., 817 F. Supp. 1000 (D.P.R. 1993).
[206] Karibian v. Columbia Univ., 812 F. Supp. 413 (S.D.N.Y. 1993).
[207] Purrington v. University of Utah, 996 F.2d 1025 (10th Cir. 1993).
[208] Giordano v. William Paterson College, 804 F. Supp. 637 (D.N.J. 1992).

In an Ohio sexual harassment claim, the defendant's university legal council took action to acquire the medical records of the plaintiff from the university's health center.[210] During a hearing, and after the judge's "in camera" review of the records, defense attorneys revealed that they already had acquired the medical record. In response to the violation of plaintiff's right to privacy and doctor-patient privilege, the judge denied defense counsel the use of any of the medical records which would have been released. An Iowa professor brought a malicious prosecution claim against an institution for pursuing a sexual harassment claim made against him by a student, which later had been expunged from his employment record by the board of regents.[211] The court found that the statute of limitations tolled from the date the board made its final decision, not the date of a later state court decision, making his claim time barred. Finally, a sexual assault victim sued her supervisors for aiding and abetting because they were aware of the problematic behavior of the employee convicted of assaulting her.[212] The court held, however, that the supervisors' knowledge of the attitudes and behavior of the employee did not establish that they acted with intent to promote the assault.

Students

Admissions

This area saw relatively light litigation this year, and the cases involved mainly procedural issues. A medical student claimed his rights under the Federal Rehabilitation Act were violated by his dismissal and subsequent denial of readmission. The federal district court denied a motion to dismiss where the two-year statute of limitations applied.[213] The Fourth Circuit Court of Appeals reversed the decision on the grounds that the lower court should have applied the one-year statute of limitations found in the Virginia Disabilities Act.[214] The case was remanded with instructions for dismissal.

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[209] Anderson v. SUNY Health Science Ctr. at Syracuse, 826 F. Supp. 625 (N.D.N.Y. 1993).

[210] Mann v. University of Cincinnati, 824 F. Supp. 1190 (S.D. Ohio 1993).

[211] Penn v. Iowa State Bd. of Regents, 999 F.2d 305 (8th Cir. 1993).

[212] Shea v. Cornell Univ., 596 N.Y.S.2d 502 (N.Y. App. Div. 1993).

In another case involving statutes of limitation, a student denied admission to medical school brought a claim of both race and handicap discrimination more than two years after he was denied admission. The federal district court granted the institution a summary judgment finding that the statute of limitations had tolled.[215] On appeal, the court ruled that the state statute of limitations governing personal injury claims applied and had run out, barring a federal civil rights claim.[216]

In another case reported previously, the court had granted a university's motion for summary judgment in a reverse discrimination suit brought by a man who was denied admission to medical school.[217] The Tenth Circuit Court of Appeals affirmed the decision, holding that the two-year statute of limitations applied, barring a federal civil rights action.[218]

In New York, the family of a student who was accused of cheating on the SATs, sued the Educational Testing Service for breach of contract.[219] The state supreme court ruled that the testing service failed to act in good faith in its process of reviewing evidence submitted by the student to refute its claim that an imposter had taken the test. The court ordered the company to release the student's scores to selected institutions.

Nonresident Tuition

An Oregon court reversed a State System of Higher Education decision to deny a law student residency status for tuition purposes. On appeal, the court reversed the lower court decision finding that the trial court had exceeded its scope of review of State System decisions.[220] The court also ruled that the student had not been in the state for twenty-one months preceding the term for which he applied for residency status as required to achieve residency, and that he did not qualify for a military exception to the rule.

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[213] *See* The Yearbook of Education Law 1993 at 207, Wolsky v. Eastern Va. Medical Auth., 795 F. Supp. 171 (E.D. Va. 1992).

[214] Wolsky v. Medical College of Hampton Roads, 1 F.3d 222 (4th Cir. 1993).

[215] *See* The Yearbook of Education Law 1992 at 114, 195, Baker v. Board of Regents of Kan., 768 F. Supp. 1436 (D. Kan. 1991).

[216] Baker v. Board of Regents of Kan., 991 F.2d 628 (10th Cir. 1993).

[217] Baker v. Board of Regents of Kan., 768 F. Supp. 1436 (D. Kan. 1991).

[218] Baker v. Board of Regents of Kan., 991 F.2d 628 (10th Cir. 1993).

[219] Dalton v. Educational Testing Serv., 588 N.Y.S.2d 741 (N.Y. Sup. Ct. 1992).

[220] Portello v. Oregon State Sys. of Higher Educ., 858 P.2d 145 (Ore. Ct. App. 1993).

In Massachusetts, students at several public institutions filed suit challenging retroactive tuition increases.[221] The district court rejected the colleges' motion to dismiss finding that the students could state a claim under the contract clause.

Financial Aid

The leadoff case involved a suit that was filed by the Washington Legal Foundation and several white students against the Department of Education.[222] The plaintiffs argued that minority scholarships violate title VI of the Civil Rights Act. After the court granted the government's motion to dismiss, the Foundation and students appealed. The court affirmed the decision using the rationale that Congress had not provided a remedy against a governmental agency,[223] although plaintiff may pursue legal action against the state system or individual institutions.[224] The court also concluded that the students' claims that the Department was not enforcing its title VI regulations and was unreasonably delaying the issuance of a new policy were without merit.

A court in Pennsylvania affirmed the State Higher Education Assistance Agency's decision to exclude guidance counselors, psychologists, and school nurses from benefits provided by a loan forgiveness act.[225] The court found that the agency's determination of what constitutes a "qualified applicant" was within its scope of responsibility and was not erroneous.

A district court in Pennsylvania ruled that the lender of last resort could base student lending decisions on applicants' credit histories.[226] However, the court noted that consideration must be given to the applicant's past attempts to repay any past debts and to any financial or personal hardships endured by the applicant.

Several cases dealt with suits brought by institutions which were denied eligibility to participate in loan programs because of their high default rates. A suit filed by an association of cosmetology schools unsuccessfully challenged the Student Loan Default Prevention Initiative Act and its regulations as a violation of the constitutional guarantee of due process.[227] On appeal, the court upheld the Act and concluded that the Secretary's interpretation of it was valid.[228] Since the Act and the regulations were not retroactive, the schools had no vested right to future eligibility for the loan program. In addition, since the Act and its regulations were rational, they did not violate substantive guidelines of due process.

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[221] Arriaga v. Members of Bd. of Regents, 825 F. Supp. 1 (D. Mass. 1992).

[222] *See* THE YEARBOOK OF EDUCATION LAW 1993 at 196, Washington Legal Found. v. Alexander, 778 F. Supp. 67 (D.D.C. 1991).

[223] *See* THE YEARBOOK OF EDUCATION LAW 1990 at 197, Women's Equity Action League v. Cavasos, 906 F.2d 742 (D.D.C. Cir. 1990).

[224] Washington Legal Found. v. Alexander, 984 F.2d 483 (D.C. Cir. 1993).

[225] Cherry v. Pennsylvania Higher Educ. Assistance Agency, 620 A.2d 687 (Pa. Commw. Ct. 1993).

[226] Philadelphia Training Ctr. Corp. v. Georgia, 822 F. Supp. 239 (E.D. Pa. 1993).

In another case, which the federal district court had earlier vacated as arbitrary and capricious, the court determined that two post-secondary schools were no longer eligible to participate in loan programs based on the Department of Education's calculation of their student loan default rate.[229] On appeal, the court ruled that the schools must be allowed to appeal the Secretary of Education's decision on the grounds that the default rates were inaccurately calculated.[230]

Finally, a case in Wisconsin involved the ineligibility of a chain of cosmetology schools to participate in federal loan programs because of a high student loan default rate.[231] The district court ruled that the Secretary of Education's decision to refuse eligibility was not arbitrary or capricious and that the due process laws were not violated by the application or appeal process. In addition, the state requirement that a decision be made within forty-five days of the school's appeal was only a directive and its delay did not render the decision invalid.

In Pennsylvania, several chapter 11 debtor institutions brought a motion against Maryland for terminating their licenses to operate in that state solely because they became debtors under the bankruptcy code.[232] The court in this case denied their motion to have reference to their chapter 11 adversarial proceedings withdrawn from the action against Maryland.

A number of cases involved students who raised fraud and breach of contract claims in the education programs in which they had enrolled and sought relief from loans they had taken. In Arkansas, the state supreme court affirmed the dismissal of a case brought by twenty-three students against the Nebraska student loan program for loans held while enrolled in an Arkansas proprietary school.[233] The students had previously won a judgment against the proprietary school for fraud and breach of contract for not providing them with the education they were promised. However, the Arkansas Supreme Court ruled that the federal guidelines for circumstances under which loans could be discharged preempted state law and, under those guidelines, the loans must be repaid. An Arizona court reached a similar finding where students of a technical school filed suit against the institution, lenders, and accrediting agencies, and refused repayment of their student loans on the grounds of negligence by the institution.[234]

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[227] *See* The Yearbook of Education Law 1992 at 197, Association of Accredited Cosmetology Sch. v. Alexander, 774 F. Supp. 655 (D.D.C. 1991).

[228] Association of Accredited Cosmetology Schs. v. Alexander, 979 F.2d 859 (D.C. Cir. 1992).

[229] *See* The Yearbook of Education Law 1993 at 197, Atlanta College of Medical & Dental Careers v. Alexander, 792 F. Supp. 114 (D.D.C. 1992).

[230] Atlanta College of Medical & Dental Careers v. Riley, 987 F.2d 821 (D.C. Cir. 1993).

[231] Pro Sch. v. Riley, 824 F. Supp. 1314 (E.D. Wis. 1993).

[232] *In re* Philadelphia Training Ctr. Corp., 155 B.R. 109 (E.D. Pa. 1993).

[233] Bogart v. Nebraska Student Loan Program, 858 S.W.2d 78 (Ark. 1993).

Another case involved students withdrawing from court-reporting school. The school commenced collection action against several students. After a student acquired an attorney's services, the attorney and the student began soliciting the aid of other students dissatisfied with the school's representation of the court reporting program. The school brought suit against the attorney alleging that the attorney interfered with its contracts with the students. A federal district court had granted summary judgment in favor of the attorney.[235] The Tenth Circuit Court of Appeals affirmed the decision concluding that the lower court acted properly in finding that the college failed to introduce genuine facts which could affect the outcome of the suit.[236]

In a fourth case, student borrowers brought claims against the United States Secretary of Education, state and private guaranty agencies, and banks for the fraudulent activity of a culinary school. The federal district court previously concluded that there might be several possible grounds for recovery for the students.[237] On subsequent motions to dismiss on appeal, the Tenth Circuit Court of Appeals ruled in favor of the defendants.[238] The court found that there could be no recovery from the Secretary of Education, state, or guaranty agencies because they had no involvement in the alleged fraudulent activity and were too far removed from the cause to be found liable. There was also no special relationship between the lender and the school which might have otherwise prevented collection on the loans. Finally, the court found that omission of a required notice of claims and defenses was a technicality which did not give rise to any claim upon which relief could be granted.

Student eligibility for financial aid was litigated in several states. In Pennsylvania, a foreign student brought suit against the Immigration and Naturalization Service, Department of Education, and her university.[239] She claimed that her due process and equal protection rights were violated after her financial aid was canceled. The court granted summary judgment for the defendants and dismissed the case on the grounds that the student failed to prove citizenship. The court also concluded that the university could not be held liable for following eligibility requirements as set forth by Congress. In New York, the appellate court affirmed a decision regarding an inmate's eligibility to receive state financial assistance finding that his default on an earlier loan made him ineligible for additional loans.[240]

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[234] Keams v. Tempe Technical Inst., 807 F. Supp. 569 (D. Ariz. 1992).

[235] *See* YEARBOOK OF EDUCATION LAW 1992 at 219, Brown Mackie College v. Graham, 768 F. Supp. 1457 (D. Kan. 1991).

[236] Brown Mackie College v. Graham, 981 F.2d 1149 (10th Cir. 1992).

[237] *See* THE YEARBOOK OF EDUCATION LAW 1993 at 218, Jackson v. Culinary Sch. of Wash., 788 F. Supp. 1233 (D.D.C. 1992).

[238] Jackson v. Culinary Sch. of Wash., 811 F. Supp. 714 (D.D.C. 1993).

[239] Taha v. Immigration & Naturalization Serv., 828 F. Supp. 362 (E.D. Pa. 1993).

Collection of loan issues were present in Oklahoma where a creditor filed a suit to collect on a loan for dental school that he and his former wife made to his then brother-in-law.[241] The court of appeals ruled that since the creditor showed sufficient evidence that he had a right to recovery, he could collect on the loan. A chapter 7 debtor who received an automatic stay from his institution filed an emergency motion with the court.[242] The institution threatened to refuse to allow him to attend graduation or release his transcripts until he paid overdue tuition payments. The court concluded that the college was to take no collection actions against the student until nondischargeability was determined.

A case in the courts since 1985 involved a borrower who took out several educational loans and was declared in default.[243] The original default judgment was set aside and the trial court quashed the execution and garnishments that had been issued. A state appeals court reversed the order setting aside the default judgment and denied the university's motion for judgment on the pleading. In the current case, the court reversed that decision and remanded the case with directions to hear and determine the issues.[244] In another case, a borrower who was placed in default filed suit against a credit bureau for allegedly failing to use reasonable investigative procedures and causing him harm.[245] The court of appeals affirmed a lower court's ruling that the borrower had failed to support his allegation. In New York, the appellate division of the supreme court affirmed the court's decision to deny a student borrower's motion to vacate a default judgment against him.[246] The court held that federal law states there is no statute of limitations regarding when a default judgment could be entered. Other arguments made by the student regarding claims of fraud and the improper calculation of interest were also found to be without merit. In another case, the court granted

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240 Washington v. New York State Higher Educ. Servs. Corp., 600 N.Y.S.2d 800 (N.Y. App. Div. 1993).

241. Olson v. Reavis, 859 P.2d 524 (Okla. Ct. App. 1993).

242. Carson v. Logan College of Chiropractic, 150 B.R. 228 (Bankr. E.D. Mo. 1993).

243. *See* YEARBOOK OF EDUCATION LAW 1991 at 220, Board of Regents of S.W. Mo. State Univ. v. Harriman, 792 S.W.2d 388 (Mo. Ct. App. 1990).

244. Board of Regents for S.W. Mo. State Univ. v. Harriman, 857 S.W.2d 445 (Mo. Ct. App. 1993).

245. Wolfe v. Woods, 620 N.E.2d 870 (Ohio Ct. App. 1993).

246. State v. Shaw, 592 N.Y.S.2d 878 (N.Y. App. Div. 1993).

the government's motion for summary judgment and ruled that the doctrine of laches could not be applied to a recovery of student loans and that the debt must be paid.[247]

A federal district court in Indiana ruled that a student loan guaranty agency had acted properly in placing loans in default.[248] The Superior Court of New Jersey overturned a law division's decision involving the defaulted loans of a former dental student.[249] The superior court also awarded interest and counsel fees to the state agency.

In five cases, the courts ruled in favor of the government, where the debtor argued that the recovery of the loans was barred by the statute of limitations, finding that the Higher Education Technical Amendments of 1991 applied retroactively and that the lawsuits were not time-barred.[250] A debtor in Michigan filed cross motions against a government suit to collect on defaulted loans.[251] The former student unsuccessfully claimed a number of affirmative defenses including statute of limitations, laches, and misconduct prohibiting performance. The court concluded that the statute of limitations did not bar action, that any alleged misconduct by the university did not relieve the student from repaying his loans, and that the government's claim was not a compulsory counterclaim to earlier lawsuits filed by the student.

In several cases, bankruptcy courts ruled that student loans could not be discharged because they became due less than seven years before petition for bankruptcy.[252] In Florida, the bankruptcy court ruled that an assignee of a student loan could take steps to collect on a loan which had already been discharged.[253] The court concluded that the seven-year period after which the debt may be discharged begins with the execution of the consolidated loan.

A number of cases again dealt with medical students who received loans through the National Health Services Scholarship Program in return for serving in preselected areas of need. If the participant refuses to serve in an assigned area, he or she is liable for the amount of the loan plus treble damages. Several courts affirmed decisions placing in default the loans of doctors who had participated in the program but refused to practice in the service area.[254] A participant in Arizona argued that since he did not accept payment for his final year, he was not liable for treble damages.[255] The court of appeals disagreed and concluded that since he did not comply with the deferment requirements, he was liable for the damages. In another NHSC-related case, the court found that discharging a chapter 13 debtor's total debt to the NHSC would be shockingly unfair, while requiring repayment of the total debt would be unconscionable.[256] The court permitted the debtor to discharge one-half of the amount of the loan on the grounds that the debtor did not serve in her assigned area but provided some service in an underserved community.

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[247] United States v. Robbins, 819 F. Supp. 672 (E.D. Mich. 1993).

[248] Stone v. United Student Aid Funds, 818 F. Supp. 254 (S.D. Ind. 1993).

[249] New Jersey Higher Educ. Assistance Auth. v. Martin, 628 A.2d 365 (N.J. Super. Ct. App. Div. 1993).

[250] United States v. Davis, 801 F. Supp. 581 (M.D. Ala. 1992); United States v. Glockson, 998 F.2d 896 (11th Cir. 1993); United States v. Hodges, 999 F.2d 341 (8th Cir. 1993); New York State Higher Educ. Servs. Co. v. Pratcher, 593 N.Y.S.2d 166 (N.Y. Sup. Ct. 1993); United States v. Smith, 811 F. Supp. 646 (S.D. Ala. 1992).

[251] United States v. Cawley, 821 F. Supp. 1219 (E.D. Mich. 1993).

[252] Garrison v. Southwest Baptist Univ., 153 B.R. 879 (Bankr. W.D. Mo. 1993); Woodcock v. Chemical Bank, 149 B.R. 957 (Bankr. D. Colo. 1993).

[253] *In re* Menendez, 151 B.R. 972 (Bankr. M.D. Fla. 1993).

Two bankruptcy courts ruled that student loans taken by parents to finance their child's education were nondischargeable.[257] The courts concluded that section 523(a)(8) of the Bankruptcy Code applies to all student loan borrowers regardless of their status. The court came to the same conclusion in a case that involved a chapter 7 debtor who was liable as cosigner of a former spouse's student loan.[258] Similarly, in Texas, the district court affirmed a bankruptcy court's ruling that a loan taken by parents to fund their child's education was nondischargeable.[259] A district court in Pennsylvania overturned a bankruptcy court's decision to discharge education debts of a parent debtor who was liable in her capacity as cosigner.[260]

In three cases, bankruptcy courts ruled that student loans were nondischargeable on the basis that the debtors failed to prove undue hardship.[261] A bankruptcy court in Missouri denied the request to discharge a chapter 7 debtor's loan on the grounds that she did not demonstrate undue hardship and that her nondebtor spouse's income could be considered by the court.[262] In Missouri, the court also refused to discharge a loan on the grounds that repaying it was not unconscionable and did not constitute undue hardship.[263]

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[254] United States v. Becker, 995 F.2d 779 (7th Cir. 1993); United States v. Ledwith, 805 F. Supp. 371 (E.D. Va. 1992).

[255] United States v. Williams, 994 F.2d 646 (9th Cir. 1993).

[256] Matthews v. United States, Nat'l Health Serv. Corps, 150 B.R. 11 (Bankr. W.D. Pa. 1992).

[257] Mackey v. Nebraska Student Loan Program, 153 B.R. 34 (Bankr. N.D. Tex. 1993); Webb v. Student Loan Funding Co., 151 B.R. 804 (Bankr. N.D. Ohio 1992).

[258] Palmer v. Student Loan Fin. Corp., 153 B.R. 888 (Bankr. D.S.D. 1993).

[259] *In re* Varma, 149 B.R. 817 (Bankr. N.D. Tex. 1992).

[260] Pelkowski v. Ohio Student Loan Comm'n, 153 B.R. 29 (W.D. Pa. 1992).

[261] Ford v. Tennessee Student Assistance Corp., 151 B.R. 135 (Bankr. M.D. Tenn. 1993); Reyes v. Oklahoma State Regents for Higher Educ., 154 B.R. 320 (Bankr. E.D. Okla. 1993); Myers v. Pennsylvania Higher Educ. Assistance Agency, 150 B.R. 139 (Bankr. W.D. Pa. 1993).

[262] Ipsen v. Higher Educ. Assistance Found., 149 B.R. 583 (Bankr. W.D. Mo. 1992).

[263] Joyner v. United States, 146 B.R. 232 (Bankr. W.D. Mo. 1992).

A bankruptcy court ruling was reversed on appeal.[264] The federal district court concluded that the accrued interest on loans was attributable to the debtor's own conduct and that to refuse to discharge the loan was not unconscionable.[265] However, in Missouri, the bankruptcy court discharged a debtor's loans on the basis that the denial of dischargeability would be unconscionable given the debtor's record of mental and emotional problems.[266] A chapter 7 debtor had the unpaid balance of his loans discharged by a district court.[267] On appeal, the Seventh Circuit found that although the debtor satisfied the undue hardship test, he failed to demonstrate that his financial straits would extend over a long period of time.[268] The district court in Illinois ruled that the bankruptcy court applied inappropriate standards in ruling that a student loan was nondischargeable.[269] The court held that the lower court incorrectly used a standard involving long-term disability for physical or mental handicaps rather than an analysis of the debtor's future financial resources.

Several cases involved issues pertaining to the dischargeability of educational loans which are made by for-profit proprietary institutions versus not-for-profit institutions. According to the Bankruptcy Code, loans made through nonprofit or governmental institutions are not dischargeable unless undue hardship is demonstrated. In one case, the bankruptcy court ruled that a loan made by a privately insured loan program qualified as dischargeable.[270] On appeal, the court ruled that the program, not the loan itself, must be funded by a nonprofit institution.[271] Since some of the participants in the loan program through which the debtor received her loan were nonprofit institutions, the loan was nondischargeable. The decision was reversed and remanded for a hearing on the hardship issues. In a case in Illinois, a court of appeals overturned a lower court's ruling that a loan made by a credit union could be discharged because the lender acted as a profit institution.[272] The appeals court concluded that a nonprofit credit union is not a bank and is chartered as a nonprofit institution under state law.

Several cases involved issues related to federal income tax offset statutes. In Alabama, a debtor filed suit to recover a tax refund that was intercepted to repay his debt. A federal district court ruled for the taxpayer, finding that the Federal Debt Collection Procedures Act, which recognizes state law exemptions, controlled. The Eleventh Circuit Court of Appeals reversed, ruling that the Federal Income Tax Refund Offset Statutes allowing intercept procedures are controlling.[273] In New York, a federal district court granted summary judgment in favor of United States government agencies in a case where the plaintiff's income tax refund was retained to collect on a defaulted student loan.[274] In a similar case previously filed, the bankruptcy court concluded that the chapter 7 debtors could recover tax refunds setoff through the IRS if the debtors had filed for bankruptcy within the ninety days during which the IRS had authorized relief.[275] On appeal against one of the debtors, the court concluded that federal sovereign immunity had not been waived, and that a grant of monetary relief from a federal agency was not possible.[276]

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[264] *See* THE YEARBOOK OF EDUCATION LAW 1993 at 200, *In re* Malloy, 144 B.R. 38 (Bankr. E.D. Va. 1992).

[265] *In re* Malloy, 155 B.R. 940 (E.D. Va. 1993).

[266] Kline v. United States, 155 B.R. 762 (W.D. Mo. 1993).

[267] *See* THE YEARBOOK OF EDUCATION LAW 1993 at 200, *In re* Roberson, 138 B.R. 885 (N.D. Ill. 1992).

[268] *In re* Roberson, 999 F.2d 1132 (7th Cir. 1993).

[269] Vaughn v. Illinois State Scholarship Comm'n, 151 B.R. 481 (C.D. Ill. 1993).

[270] *See* THE YEARBOOK OF EDUCATION LAW 1993 at 199, *In re* Pilcher, 139 B.R. 948 (Bankr. D. Ariz. 1992).

[271] *In re* Pilcher, 149 B.R. 595 (Bankr. 9th Cir. 1993).

[272] *In re* Roberts, 149 B.R. 547 (C.D. Ill. 1993).

In another tax-related case, a bankruptcy court in Nebraska upheld a chapter 13 debtor's objection to a federal tax lien.[277] The court concluded that the debtor's retirement annuity was not property of the estate. In another chapter 13 case, the court granted a debtor's motion to avoid a judicial lien from the state loan assistance authority to the extent that the lien impaired his homestead exemption.[278]

Similar rulings were reached in two cases that involved the status of educational expenses in chapter 13 plans. In Michigan, a bankruptcy court agreed to a modification of a chapter 13 plan.[279] The plan specified that while the children's advanced education expenses were considered nondiscretionary, the debtor's education expenses were. In the other case, the court overruled objections to the plan that considered a daughter's college education expenses as not disposable.[280]

Many of the cases involved the issue of whether chapter 13 debtors could repay educational debts at rates that were different than those for other nonsecured loans. In one case, the court refused confirmation of a plan on the grounds that the debtor failed to prove that the plan did not discriminate against general unsecured creditors who received 32% of debt while student loan creditors received 100%.[281] In three other cases, the court sustained objections to plans on similar grounds.[282] In a case returning to the courts from last year, the bankruptcy court refused confirmation of a chapter 13 plan, which was sustained on appeal.[283] However, in another case, a trustee filed an objection to the confirmation plans, but the court confirmed the plans on the grounds that the structure and history of the Bankruptcy Code indicated that if the other requirements for confirmation were met, chapter 13 plans may provide for payment at a rate higher than other unsecured claims.[284] Similarly, in Minnesota, a bankruptcy court confirmed a plan that the chapter 13 trustee objected to as discriminatory.[285]

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[273] Bosarge v. United States Dep't of Educ., 5 F.3d 1414 (11th Cir. 1993).

[274] Setlech v. United States, 816 F. Supp. 161 (E.D.N.Y. 1993).

[275] *See* YEARBOOK OF EDUCATION LAW 1993 at 200, Hankerson v. United Sates Dep't of Educ., 133 B.R. 711 (Bankr E.D. Pa. 1991).

[276] Pettis v. United States Dep't of Educ., 146 B.R. 653 (E.D. Pa. 1992).

[277] *In re* Fin'., 153 B.R. 883 (Bankr. D. Neb. 1993).

[278] *In re* Evaul, 152 B.R. 31 (Bankr. W.D.N.Y. 1993).

[279] *In re* Gonzales, 157 B.R. 604 (Bankr. E.D. Mich. 1993).

[280] *In re* Riegodedios, 146 B.R. 691 (Bankr. E.D. Va. 1992).

[281] *In re* Christophe, 151 B.R. 475 (Bankr. N.D. Ill. 1993).

[282] *In re* Lewman, 157 B.R. 134 (Bankr. S.D. Ind. 1992); *In re* Smalberger, 157 B.R. 472 (Bankr. D. Ore. 1993).

Another issue involved the interest accumulated after the debtor filed a petition for bankruptcy. In one case, the court confirmed a plan where a creditor objected because the plan failed to provide for postpetition interest.[286] The court concluded that the bankruptcy code did not allow for this interest when the underlying claim is paid in full. However, in a similar case in Colorado, a federal district court refused to confirm a plan on the basis that postpetition interest on a nondischargeable loan is also nondischargeable.[287]

In a divorce case, a debtor alleged that her loan was paid in full by her ex-husband.[288] She filed suit against the Department of Education requesting correction of her loan file and credit record, damages, and a refund for funds taken from her tax refund. The district court granted the government's motion for summary judgment and concluded that the borrower failed to sufficiently show that her debt was paid in full.

Many of the cases involved issues of divorced parents' obligations to pay for the college education of their children. The appellate court of Illinois affirmed a ruling that a father would not have to contribute to college expenses of an emancipated daughter attending an unaccredited Bible college.[289] In a case where both a son and daughter were over eighteen, the court ordered the father to pay educational expenses for the daughter, but terminated support obligations for both of them.[290] In a similar case, the New York Supreme Court concluded that the father no longer had to pay child support for his emancipated daughter, but that he did have to pay college expenses for both of his children.[291] The Superior Court of New Hampshire affirmed a lower court's ruling that a father could be required to contribute to his adult child's college expenses.[292] In another case, an appeals court reversed a trial court's decision, requiring a child to attend a state institution in order to receive support from the father.[293] One case involved a divorce agreement in which the father agreed to pay all college education costs, but the agreement was amended to read all "reasonable" costs.[294] The Court of Civil Appeals of Alabama ruled that the state properly filed a petition to modify child support during the child's minority.[295] The state could also order the proper parties to collect any support. In Tennessee, the court ruled that the father had fulfilled his obligation to pay a reasonable amount of college tuition, but the mother still had standing to enforce the agreement.[296] In South Carolina, a court affirmed a decision that $10,000 constituted a reasonable contribution towards a son's education.[297] A court in Pennsylvania vacated a lower court's ruling which had terminated an educational support order because of the father's estrangement from his son.[298]

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[283] *In re* Tucker, 150 B.R. 203 (Bankr. N.D. Ohio 1992); *see* The Yearbook of Education Law 1992 at 200, *In re* Tucker, 130 B.R. 71 (Bankr. S.D. Iowa 1991).

[284] *In re* Brown, 152 B.R. 232 (Bankr. N.D. Ill. 1993); *see* The Yearbook of Education Law 1988 at 252, *In re* Brown, 79 B.R. 789 (Bankr. N.D. Ill. 1987).

[285] *In re* Benner, 156 B.R. 631 (Bankr. D. Minn. 1993).

[286] *In re* Wasson, 152 B.R. 639 (Bankr. D.N.M. 1993).

[287] Jordan v. Colorado Student Loan Program, 146 B.R. 31 (D. Colo. 1992).

[288] Foster v. Alexander, 811 F. Supp. 5 (D.D.C. 1993).

[289] *In re* Marriage of Spear, 613 N.E.2d 358 (Ill. App. Ct. 1993).

[290] Marshall v. Marshall, 601 N.E.2d 9 (Ind. Ct. App. 1992).

[291] Healey v. Healey, 594 N.Y.S.2d 90 (N.Y. App. Div. 1993).

Student Organizations

Cases involving student organizations concerned issues revisited by the courts. The prohibition of demonstrations of products for sale in a New York university's dormitory rooms raised claims of commercial speech violations under the First Amendment.[299] In a federal rules court decision, the case was held moot because the students had graduated and the case could not be amended to substitute current students for the original plaintiffs.[300]

Another case involved students at the University of California who brought suits challenging the validity of mandatory student fees.[301] At issue was the collection of fees which were given to the Association of Students for the University of California (USUC) to be used for funding student activities, including the student senate and its elections. The senate passed resolutions on school, local, state, and national political issues. The Supreme Court of California concluded that although the regents could impose and collect the fees, the government could not force a student to contribute money to support causes the student may oppose.[302] Therefore, the institutions had to grant partial refunds to students objecting to the use of such fees. The court also ordered further hearings to determine whether student fees were used in the passing and publishing of political resolutions by the student senate.

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[292] LeClair v. LeClair, 624 A.2d 1350 (N.H. 1993).

[293] State *ex rel.* Brown v. Brown, 622 So. 2d 376 (Ala. Civ. App. 1993).

[294] Reynolds v. Diamond, 605 So. 2d 525 (Fla. Dist. Ct. App. 1992).

[295] State *ex rel.* Bivins v. Bivins, 617 So. 2d 286 (Ala. Civ. App. 1992).

[296] Moscheo v. Moscheo, 838 S.W.2d 226 (Tenn. Ct. App. 1992).

[297] Ellis v. Taylor, 427 S.E.2d 678 (S.C. Ct. App. 1992).

[298] Trunkwalter v. Trunkwalter, 617 A.2d 1308 (Pa. Super. Ct. 1992).

[299] *See* The Yearbook of Education Law 1988 at 254, Fox v. Board of Trustees of State Univ. of N.Y., 649 F. Supp. 1393 (N.D.N.Y. 1981); *rev'd & remanded, see* The Yearbook of Education Law 1989 at 233, 841 F.2d 1207 (2d Cir. 1988), *rev'd & remanded,* 492 U.S. 469 (1989); *see* The Yearbook of Education Law 1992 at 203, 764 F. Supp. 747 (N.D.N.Y. 1991).

[300] Fox v. Board of Trustees of State Univ. of N.Y., 148 F.R.D. 474 (N.D.N.Y. 1993).

[301] *See* The Yearbook of Education Law 1989 at 233, Smith v. Regents of Univ. of Cal., 248 Cal. Rptr.2d 263 (Cal. Ct. App. 1988), *vacated & remanded; see* The Yearbook of Education Law 1992 at 204, 279 Cal. Rptr.2d 779 (Cal. 1991); *see* The Yearbook of Education Law 1993 at 206, 3 Cal. Rptr.2d 384 (Cal. Ct. App. 1992).

First Amendment

Freedom of Speech. The leadoff case involves a doctoral candidate who refused to reveal the content of conversations he had with a person suspected of vandalizing an animal research facility.[303] In affirming a contempt decision against him, the court ruled that scholarly privilege was not recognized by the courts as privileged communication.

In a Minnesota case, the district court ruled in favor of the regents of the state university in an action challenging a university policy forbidding armed forces recruitment activities at its law school.[304] The Eighth Circuit Court of Appeals held the case moot since the law student who brought the action had graduated.

A First Amendment violation was alleged when a university sanctioned a fraternity's "ugly woman" contest, and the federal district court granted the fraternity a summary judgment.[305] On appeal, the Fourth Circuit Court of Appeals concluded that the contest was entitled to First Amendment protection since it was inherently expressive and intended to convey a message.[306] The court concluded that the university should have accomplished its educational goals in some fashion other than silencing speech on the basis of its viewpoint or content.

One case involved students who were charged with criminal trespassing after they set up a table to distribute political literature at a private institution.[307] The court upheld the conviction on the grounds that the property was not significantly given over to public use and, therefore, property rights did not have to give way to individual expression rights.

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[302] Smith v. Regents of Univ. of Cal., 844 P.2d 500 (Cal. 1993).

[303] *In re* Grand Jury Proceedings, Scarce v. United States, 5 F.3d 397 (9th Cir. 1993).

[304] Nomi v. Regents for Univ. of Minn., 5 F.3d 332 (8th Cir. 1993). *See* THE YEARBOOK OF EDUCATION LAW 1993 at 206, Nomi v. Regents for Univ. of Minn., 796 F. Supp. 412 (D. Minn. 1992).

[305] *See* THE YEARBOOK OF EDUCATION LAW 1993 at 204, Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 773 F. Supp. 792 (E.D. Va. 1991).

[306] Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993).

[307] State v. Guice, 621 A.2d 553 (N.J. Super. Ct. Law Div. 1993).

Freedom of Religion. A student was denied attorney fees by a federal district court after an out of court settlement in 1991.[308] The Sixth Circuit Court of Appeals ruled that the court has the discretion to award attorney fees to the prevailing party.[309] The veterinary medicine curriculum requiring the operation on live animals did not violate the plaintiff's right to freely exercise her religion, and the plaintiff was not entitled to force the university to exempt her from performing those requirements. The decision was, therefore, affirmed on the grounds that the plaintiff was not the prevailing party in the settlement.

Dismissal

Disciplinary Dismissal. Disciplinary cases included challenges of the constitutionality of student conduct policies, questions of due process, discrimination claims, and academic dishonesty. An Arkansas court ruled that a university would be in contempt if it continued its constitutional violation of suspending students who possessed firearms on campus. The Supreme Court of Arkansas denied a motion by the university to stay the lower court ruling.[310] The Ohio Court of Appeals affirmed a lower court's finding that a university's dismissal of the plaintiff for burglary as per state statute was constitutional and properly applied.[311] The school's policy stating that suspension would result from offenses of violence affecting persons or property of the institution was not overly broad or vague.

In a case involving a fraternity member who was suspended for punching another fraternity member, a court of appeals reversed a lower court's ruling that the university denied the student procedural due process.[312] The student had alleged that his due process rights were violated when (1) the dean and the disciplinary committee had a prehearing meeting, and (2) a member from the injured student's fraternity served on the hearing committee. The court disagreed, however, and held that due process had been provided. In Louisiana, a court of appeals dissolved an injunction enjoining a private university from imposing disciplinary sanctions against a student.[313] The suspended student claimed that he had engaged in consensual sexual intercourse while the woman, inebriated at the time, maintained she never consented. The court ruled that the university's actions were neither arbitrary nor capricious.

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[308] *See* YEARBOOK OF EDUCATION LAW 1993 at 170, Kissinger v. Board of Trustees of Ohio State Univ., 786 F. Supp. 1308 (S.D. Ohio 1992).

[309] Kissinger v. Board of Trustees of Ohio State Univ. College of Veterinary Medicine, 5 F.3d 177 (6th Cir. 1993).

[310] Smith v. Denton, 855 S.W.2d 322 (Ark. 1993).

[311] Relford v. University of Akron, 610 N.E.2d 521 (Ohio Ct. App. 1991).

[312] Henderson State Univ. v. Spadoni, 848 S.W.2d 951 (Ark. Ct. App. 1993).

[313] Ahlum v. Administrators of Tulane Educ. Fund, 617 So. 2d 96 (La. Ct. App. 1993).

In Florida, a police cadet filed a section 1983 claim and other actions for his expulsion from a community college.[314] The plaintiff claimed that his refusal to make untrue allegations against an associate in a city police investigation resulted in his suspension. A federal district court upheld the cadet's section 1983 and First Amendment claims, but dismissed the others. In Missouri, a student athlete brought a section 1983 claim against the university after he was suspended for stealing from the bookstore. The student had attempted to collect refunds from the book store using six forged refund slips. After one day of hearings, a district court judge ruled that the university's action was arbitrary and capricious. The Eighth Circuit Court of Appeals reversed and ruled that presented evidence supported the conclusion that there was no constitutional violation.[315]

A law student was accused of cheating on a law school exam. The state court had earlier ruled that the student had not exhausted administrative remedies.[316] On appeal, the court concluded that the evidence supported the position that the student had cheated, and that the student failed to prove that the university violated the law in conducting an investigation, holding a hearing, and finding her guilty.[317] A student suspended from college for allegedly cheating on an exam, appealed a New York court denial of her motion for a preliminary injunction which had prevented enforcement of her suspension pending resolution of her article 78 proceedings.[318] The Supreme Court Appellate Division ruled that the injunction should be granted. Another New York student who was dismissed for allegedly cheating on a test, brought an article 78 suit against the college.[319] The court remitted the case for a new college disciplinary hearing, concluding that the college had failed to substantially comply with its own procedures.

A plagiarism case which has been in the courts for a while, returned this year. A student who was found guilty of plagiarism had that determination annulled by the court, and a new hearing was ordered.[320] At that hearing, the student was again found guilty. She filed an article 78 proceeding in state court. The university objected to the filing on the grounds that the petition was jurisdictionally defective because it lacked a return date. On appeal, the New York Supreme Court Appellate Division agreed with that point of law and dismissed the petition.[321]

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[314] Perez v. City of Key West, Fla., 823 F. Supp. 934 (M.D. Fla. 1993).

[315] Coleman v. Monroe, 977 F.2d 442 (8th Cir. 1992).

[316] *See* YEARBOOK OF EDUCATION LAW 1991 at 223, Florida Bd. of Regents v. Armesto, 563 So. 2d 1080 (Fla. Dist. Ct. App. 1990).

[317] Armesto v. Weidner, 615 So. 2d 707 (Fla. Dist. Ct. App. 1992).

[318] Melvin v. Union College, 600 N.Y.S.2d 141 (N.Y. App. Div. 1993).

[319] Weidemann v. State Univ. of N.Y. College at Cortland, 592 N.Y.S.2d 99 (N.Y. App. Div. 1992).

[320] *See* THE YEARBOOK OF EDUCATION LAW 1991 at 222, Kalinsky v. State Univ. of N.Y. at Binghamton, 557 N.Y.S.2d 577 (N.Y. App. Div. 1990).

Academic Dismissal. An appeals court in Illinois affirmed a trial court's decision to grant summary judgment to a dental school in a case where a former student alleged that his dismissal was based on age discrimination rather than on academic reasons.[322] The court concluded that the record strongly showed that the reasoning behind the defendant's decision to dismiss the student were mediocre grades and unsatisfactory clinical performance.

One case involved the trial of a former student who alleged that her dismissal was due to her handicap, a violation of the Rehabilitation Act.[323] The student alleged that when the college learned of her schizophrenia it created a hostile environment forcing her withdrawal. The college maintained that it had erred in admitting the student and tried to encourage her, because of her marginal academic skills, to put off enrollment until summer when remedial programs would improve her chances of academic success. The jury found for the college and the student appealed, challenging various instructions given to the jury. The appeals court affirmed the trial court decision.

In Kansas, a federal district court dismissed all claims against a state university in a case where a former student filed a section 1983 suit because of his dismissal from a research group.[324] After the head of the research group rejected his dissertation proposal, he was asked to leave the project and the degree program. The court ruled that the university had immunity under the Eleventh Amendment and dismissed the claim.

A district court granted summary judgment to a private institution in a case where a dismissed student brought a discrimination suit on the basis of handicap.[325] The student enrolled in a program for students with learning disabilities for several semesters, was unable to maintain an adequate grade point average, and was dismissed.

One case involved a statute of limitations for a suit filed by a former nursing student against the college.[326] The court concluded that tolling for the statute of limitations began on the latest date of the alleged discrimination rather than the date the student filed a claim with the State Department of Human Rights. The college's motion to dismiss was approved.

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321. Kalinsky v. State Univ. of N.Y. at Binghamton, 591 N.Y.S.2d 242 (N.Y. App. Div. 1992).
322. Frederick v. Northwestern Univ. Dental Sch., 617 N.E.2d 382 (Ill. App. Ct. 1993).
323. Wood v. President & Trustees of Spring Hill College, 978 F.2d 1214 (11th Cir. 1992).
324. Ndefru v. Kansas State Univ., 814 F. Supp. 54 (D. Kan. 1993).
325. Halasz v. University of New England, 816 F. Supp. 37 (D. Me. 1993).
326. Cheeney v. Highland Community College, 819 F. Supp. 749 (N.D. Ill. 1993).

A medical student who was dismissed for poor scholarship filed a breach of contract suit against the college seeking reinstatement and monetary damages.[327] The former student lost the trial in the Court of Claims and, on appeal, the court affirmed the decision. In New York, a former law student appealed the dismissal of her complaint that her contractual rights were violated when she was terminated from law school.[328] The court concluded that all claims were barred by the doctrine of res judicata.

Other Constitutional and Statutory Privileges

Other constitutional questions involve violations of constitutional rights and federal statutory privileges. Colleges and universities are alleged to have discriminated against handicapped students in services and programs where they failed to meet student's expected accommodations. One case involved an attorney who claimed that while he was a student, a law school discriminated against him in violation of the Disabilities Act, as well as other federal and state statutes.[329] The facts detail a number of alleged instances where faculty and administrators of the law school were hostile and retaliatory toward the plaintiff. The court dismissed those portions of the complaint that took place before the ADA was enacted. Other claims, such as the former student's hostile environment and retaliation claims, were allowed to proceed. The college's motion for a change of venue was denied. A handicapped Idaho student brought a section 1983 suit seeking damages against a university where he had been denied a free handicap parking permit.[330] The court concluded that since the student had never actually applied for a permit, he did not have standing to sue.

In companion cases, a Texas state appeals court ruled on convictions for students charged with disruptive activity on campus.[331] The court overruled the grounds for review and concluded that the appellants failed to comply with notice provisions. The court also held that the statute under which they were convicted was neither overbroad nor vague and that additional testimony of witnesses was too conjectural to be admissible.[332]

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[327] Bleicher v. University of Cincinnati College of Medicine, 604 N.E.2d 783 (Ohio Ct. App. 1992).

[328] Keane v. New York Law Sch., 589 N.Y.S.2d 18 (N.Y. App. Div. 1992).

[329] Rothman v. Emory Univ., 828 F. Supp. 537 (N.D. Ill. 1993).

[330] Madsen v. Boise State Univ., 976 F.2d 1219 (9th Cir. 1992).

[331] *See* THE YEARBOOK OF EDUCATION LAW 1990 at 237, Wilson v. State, 777 S.W.2d 823 (Tex. Ct. App. 1989); and THE YEARBOOK OF EDUCATION LAW 1991 at 226, Arnold v. State, 778 S.W.2d 172 (Tex. Ct. App. 1989).

[332] Arnold v. State, 853 S.W.2d 543 (Tex. Crim. App. 1993); Wilson v. State, 853 S.W.2d 547 (Tex. Crim. App. 1993).

Several cases involved title IX and equality between women's and men's athletic teams. A federal district court in New York ordered a university to grant varsity status to a women's ice hockey team and to provide equivalent athletic opportunities in accordance with the law.[333] The court also denied the former students' demands for compensatory damages and ordered their attorney to file for fees. However, the Second Circuit Court of Appeals vacated that decision as moot on the grounds that the ice hockey season was over and the students had graduated.[334]

A district court in Colorado issued a permanent injunction against a university that terminated a women's varsity softball team.[335] The court held that the decision violated title IX and ordered the school to play a fall exhibition season. The Tenth Circuit Court of Appeals affirmed the title IX violation but reversed the exhibition season order as beyond the district court's authority.[336] In a similar case in Pennsylvania, the federal district court granted an injunction against a university which reclassified women's gymnastics and field hockey teams from varsity sports to club sports.[337]

The First Circuit Court of Appeals affirmed a lower court's preliminary injunction restoring varsity status to women's gymnastics and volleyball teams at a Rhode Island private university.[338] Finally, in a case decided last year, the Supreme Court of Louisiana amended the judgment of the appeals court to delete the use of social security numbers but otherwise affirmed the decision.[339]

Liability

Litigated liability issues reported here include personal injury, negligence, educational and medical malpractice, deceptive practices, and worker compensation claims. Contract liability is also covered in this section. Protections against liability claims in the form of indemnification are also reported. Insurance claims and coverage are in the section on contract liability.

The leadoff case involved the area of asbestos personal injury and property damage litigation. A national class action for colleges and universities was filed in 1986, which was later dismissed, and this case was filed in 1987.[340] After reviewing the evolution of class action in the asbestos litigation, and noting that approximately 16% to 35% of the 3,000 colleges and universities would qualify for inclusion in the class, the court conditionally certified the class. The court outlined phase one certification and discovery procedures.

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[333] Cook v. Colgate Univ., 802 F. Supp. 737 (N.D.N.Y 1992).

[334] Cook v. Colgate Univ., 992 F.2d 17 (2d Cir. 1993).

[335] Roberts v. Colorado State Univ., 814 F. Supp. 1507 (D. Colo. 1993).

[336] Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993).

[337] Favia v. Indiana Univ. of Pa., 812 F. Supp. 578 (W.D. Pa. 1993).

[338] Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993).

[339] Hays v. Lundy, 621 So. 2d 616 (La. 1993).

Personal Injury

This year's cases involve claims emanating from death which occurred in the course of college activities both on or off campus, or resulting from alcohol consumption or the use of products which are inherently dangerous. Cases resulting from bodily injury were presented using categories similar to those of the wrongful death actions. Questions of libel and slander, battery, and immunity issues are also included in this section.

Alcohol consumption was a factor in a number of cases involving both death and bodily injury. The estate of the deceased, killed in an auto accident by an intoxicated underage college student who had left a fraternity party where alcohol was being served, sued the college, the local and national fraternity, and the driver causing the collision.[341] The court ruled that under Arizona's social host liability laws, where the social host is immune from suits involving the actions of third parties after they received liquor from the host, did not violate either the due process or equal protection clauses. In Indiana, the court found that a settlement against the intoxicated driver in another state did not preclude a suit against the college and the fraternity by the mother of a student struck and killed by an intoxicated driver on campus.[342] A Pennsylvania student, who became inebriated at a fraternity party on campus, was injured in a fall when she took a dangerous shortcut path back to her residence hall.[343] In the suit against the university, the court issued a summary judgment in favor of the institution. The court found that the underage adult student was solely responsible for her actions which resulted in the injury. Finally, an Oregon court ruled that the fraternity was not liable for the violent actions of an underage adult student who obtained alcohol at a local fraternity house.[344] A member of a school's tennis team who was on a team trip to Puerto Rico, where drinking is legal at age eighteen, was injured while returning from dinner where he became intoxicated.[345] Neither the coach nor the school was responsible for the student's behavior.

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[340] Central Wesleyan College v. W.R. Grace & Co., 143 F.R.D. 628 (D.S.C. 1992).

[341] Estate of Hernandez v. Arizona Bd. of Regents, 838 P.2d 1283 (Ariz. Ct. App. 1991).

[342] Hanover College, Sigma Chi Int'l Fraternity v. Thomas, 617 N.E.2d 568 (Ind. Ct. App. 1993).

[343] Booker v. Lehigh Univ., 800 F. Supp. 234 (E.D. Pa. 1992), *aff'd*, 995 F.2d 215 (3d Cir. 1993).

[344] Sparks v. Warren, 856 P.2d 337 (Ore. Ct. App. 1993).

In the drowning of a student in a college swimming pool, the court upheld a damage award against the institution.[346] The court held that sovereign immunity did not preclude a damage award higher than what the institution's insurance contractor would cover. In a case where a New York college student was killed in an automobile accident while on a school-sponsored trip to the Bahamas, the court needed to determine whether Florida, New York, or Bahamas law applied.[347] The court found that New York law governed because both the college and its insurance company were located in that state. Parents of a military academy student who committed suicide brought a wrongful death claim against the institution.[348] On appeal, a South Carolina court ruled that the trial judge's instructions on the assumption of risk were incorrect and ordered a new trial. The court found that the act of committing suicide was not an assumption of risk by the deceased, emanating from the institution's negligent actions, making it a defense for the institution against plaintiffs' claim. Finally, a New York court affirmed the decision against an institution which allowed a lake to become electrically charged, resulting in the electrocution of a student.[349]

Assaults occurring on campus or in residence halls were litigated. In New York a court found that the institution had fulfilled its duty to provide security protection and was, therefore, not liable for the assault of a male student by an intruder in his dormitory room.[350] A woman who was raped on campus while on her way to the campus credit union brought a negligent police protection claim against the institution.[351] The court found that the attacker, not the university security system, was the cause of the plaintiff's injuries.

Cases involving bodily injury, such as those resulting from a person's slipping and falling on the way into the theater, were back in the courts.[352] The court, on appeal, ruled that instructions about a city code requiring the lighting of stairs going into theaters did not prejudice the jury finding or the damage award in favor of the plaintiff.[353] A New

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[345] Albano v. Colby College, 822 F. Supp. 840 (D. Me. 1993).

[346] Board of Regents of the Univ. Sys. of Ga. v. Daniels, 430 S.E.2d 45 (Ga. Ct. App. 1993).

[347] Beattey v. College Centre of Finger Lakes, 613 So. 2d 52 (Fla. Dist. Ct. App. 1992).

[348] Hoeffner v. The Citadel, 429 S.E.2d 190 (S.C. 1993).

[349] Higgins v. State, 596 N.Y.S.2d 479 (N.Y. App. Div. 1993).

[350] Vangeli v. Schneider, 598 N.Y.S.2d 837 (N.Y. App. Div. 1993).

[351] Nola v. University of S. Cal., 20 Cal. Rptr.2d 97 (Cal. Ct. App. 1993).

[352] *See* THE YEARBOOK OF EDUCATION LAW 1992 at 220, Rothstein v. City Univ. of N.Y., 562 N.Y.S.2d 340 (N.Y. Ct. Cl. 1990).

[353] Rothstein v. City Univ. of N.Y., 599 N.Y.S.2d 39 (N.Y. App. Div. 1993).

York court found that the state's work place safety codes made the institution liable for the injuries suffered by a worker in a fall off a ladder.[354]

Procedural questions surround several bodily injury claims. The claim of a student player injured during an ice hockey game brought against the director of an intramural program was the sole jurisdiction of the court of claims in Illinois.[355] A student, the claimant, struck by a university van driven by a university employee failed to meet the Maine's Tort Claim Act requirement of informing the state about the particulars of the claim within 180 days.[356]

The institution's duty to warn or cancel an ethnic day celebration was at issue in a Minnesota case.[357] Vague rumors of violence occurring over the past several years with the resulting gang violence and shooting of a bystander at this year's event did not obligate the university to take greater action than it did in providing security. A Michigan court found that the uneven parallel bars in a gymnasium were not permanent fixtures of a public building, exempting the institution from liability.[358] A gymnast was injured when a bolt on the uneven bars snapped, resulting in this claim. However, a Colorado court ruled that a printing press was a permanent fixture of a public building and therefore supported the institution's claim of immunity in a suit that was filed by the injured operator of the press.[359] An Indiana university appealed a ruling and damage award to a student who suffered a knee injury during a judo class.[360] The court found that the doctrine of incurred risk was a matter to be decided by the jury because the student had complained to the instructor about the rough methods used by the particular student who caused the plaintiff's injury while practicing judo falls.

Three students were walking along a bridge which ran parallel to a building, when one of them leaped over a concrete barrier at the edge of the bridge and fell two stories to a parking lot below.[361] A Texas court ruled that the open space between the barrier and the building, appearing to the student to be a sidewalk, was not a design defect, requiring the posting of warning signs on the barrier. In a case where a student was injured in a fall caused by an uneven sidewalk, the university was found to share 60% of the fault.[362] However, a university was without liability when a woman stubbed her toe on an uneven sidewalk that was owned by the city adjacent to the campus. The walk was commonly used by cheerleader camp participants to get from their residence hall to practice areas.[363] The city's complete liability was affirmed. A baseball spectator, stuck by a foul ball while seated in the stands outside the normal area protected by screening, took a known and obvious risk in choosing to sit in that section.[364]

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[354] Figueroa v. Manhattanville College, 598 N.Y.S.2d 77 (N.Y. App. Div. 1993).

[355] Rembis v. Board of Trustees of Univ. of Ill., 618 N.E.2d 797 (Ill. App. Ct. 1993).

[356] Kelly v. University of Me., 623 A.2d 169 (Me. 1993).

[357] Rasivong v. Lakewood Community College, 504 N.W.2d 778 (Minn. Ct. App. 1993).

[358] Carmack v. Macomb County Community College, 502 N.W.2d 746 (Mich. Ct. App. 1993).

[359] Reynolds v. State Bd. for Community Colleges & Occupational Educ., 853 P.2d 539 (Colo. Ct. App. 1992).

[360] Clark v. Wiegand, 617 N.E.2d 916 (Ind. 1993).

[361] Chapman v. City of Houston, 839 S.W.2d 95 (Tex. Ct. App. 1992).

[362] Redden v. University of Cincinnati, 610 N.E.2d 1212 (Ohio Ct. Cl. 1991).

A student fraternity member, observing a mud football game while consuming alcoholic beverages, was rendered quadriplegic when he suddenly dove head first onto the muddy field.[365] The fraternity alumni house corporation's ability to control the activities of the fraternity did not create a duty to control the behavior of the members of the fraternity. However, a fraternity was found grossly negligent in the design of a pool when a student suffered a compound leg fracture and infection after she was thrown from the deck into the pool.[366] Because the plastic pool leaked, it was not at its original depth of six and one-half feet when the student was thrown in. Finally, a university as the owner of a research vessel was found to be 25% liable for the captain's depression.[367] The captain maintained that his depression was a result of several dangerous incidents on the high seas that occurred because of the university's failure to maintain the vessel in a sea worthy condition. The court affirmed the amount and interest of the damage award to the captain.

Libel and slander claims include charges brought by a New Mexico academic vice president against a professor at the institution.[368] The professor had charged various wrongdoings regarding grade changes and athletes. The court found that the New Mexico slander statute was unconstitutional when it was applied to pronouncements about the performance of public officials on matters of public concern. A Montana professor was charged with slandering a student.[369] The court found that the settlement between the institution and the student barred this suit in court. A Louisiana professor referred to a student as a slut and then retaliated in class against her as well as the other students who verified his actions.[370] She sued and was awarded damages. On appeal, the court ruled that reference to her as a slut was slander and increased the amount of the damage award.

False arrest and entrapment cases were also brought. In Pennsylvania a student was arrested for possession and delivery of marijuana and was later convicted, but the court reversed the conviction based on entrapment.[371] A mental patient successfully sued a university for involuntary treatment after a court ordered him released.[372]

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[363] Dorlon v. City of Springfield, 843 S.W.2d 934 (Mo. Ct. App. 1992).

[364] Bellezzo v. State, 851 P.2d 847 (Ariz. Ct. App. 1992).

[365] Hughes v. Beta Upsilon Bldg. Ass'n, 619 A.2d 525 (Me. 1993).

[366] Beta Beta Chapter of Beta Theta Pi Fraternity v. May, 611 So. 2d 889 (Miss. 1992).

[367] Nelsen v. Research Co. of Univ. of Haw., 805 F. Supp. 837 (D. Haw. 1992).

[368] State v. Powell, 839 P.2d 139 (N.M. Ct. App. 1992).

[369] Stansbury v. Lin, 848 P.2d 509 (Mont. 1993).

[370] Smith v. Atkins, 622 So. 2d 795 (La. Ct. App. 1993).

Procedural questions included the upholding of a summary judgment for the institution in a case where a student walked through a plate glass window.[373] The court found the evidence insufficient to support an award for future medical expenses. Similarly, an Indiana court found that there was no connection between the professor's employment and the present claim to implicate the notification of a state entity under the Tort Claims Act.[374] The student had fallen at a professor's home where a class had been held.

Laches, or insufficiency of servicing and venue, did not bar the withdrawal of the original suit and refiling of a renewal suit in the wrongful death of a fraternity member who fell off the hood of a moving vehicle.[375] Unresolved jurisdiction questions in a Florida federal district court resulted in the dismissal of this case in a New York federal district court.[376] The plaintiff brought the claim for injury from a fall on ice at a New York college in a Florida court. The plaintiff failed to respond to an order to show cause why the case should not be dismissed for lack of jurisdiction and venue.

Negligence

Negligence claims involve a duty or standard of care the institution should have met in its relationship with the individual bringing the claim. The leadoff case involved a student athlete who died of cardiac arrest during a practice session. A federal district court ruled that the cardiac arrest of the healthy athlete was not foreseeable and issued a summary judgment for the college.[377] The Third Circuit Court of Appeals reversed and remanded the claim to trial, finding that the district court defined foreseeability too narrowly.[378] The court ruled that serious life threatening injury during intercollegiate athletic competition was foreseeable, obligating the college to a standard of care. It was up to a jury at trial to determine whether the college had met that standard of care or was negligent. In a New York case where a summary judgment had previously been issued,[379] a court, on appeal, ruled that facts were sufficient to require a determination of whether students caused the fire. The issue involved the institution's negligence as the cause of the fire in a building adjacent to a residence hall where students historically had thrown debris on the roof of the adjacent building. A private college and a basketball coach were found negligent when the coach ordered an injured player to join in a team scrimmage when he had doctor's orders to avoid physical activity.[380] The court found the re-injury of the plaintiff to be foreseeable.

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[371] Wright v. Schreffler, 618 A.2d 412 (Pa. Super. Ct. 1992).

[372] Crawford v. Regents of Univ. of Cal., 13 Cal. Rptr.2d 278 (Cal. Ct. App. 1992).

[373] Broward Community College v. Schwartz, 616 So. 2d 1040 (Fla. Dist. Ct. App. 1993).

[374] Vanvalkenburg v. Warner, 602 N.E.2d 1046 (Ind. Ct. App. 1992).

[375] Wells v. Faust, 426 S.E.2d 655 (Ga. Ct. App. 1992).

[376] Restrepo v. Colgate Univ., 149 F.R.D. 17 (N.D.N.Y. 1993).

[377] *See* THE YEARBOOK OF EDUCATION LAW 1993 at 211, Kleinknecht v. Gettysburg College, 786 F. Supp. 449 (M.D. Pa. 1992).

[378] Kleinknecht v. Gettysburg College, 989 F.2d 1360 (3d Cir. 1993).

An Ohio court found that the institution was negligent in maintaining the electrical wiring in a tunnel where the employee of a subcontractor was electrocuted while removing asbestos.[381] In a suit against the manufacturer of a laboratory coat which caught fire and burned the instructor, the institution was found negligent as well as to have intentionally impaired the employee's right to sue.[382] The institution had failed to protect the evidentiary remains of the burnt lab coat. A Louisiana university was found negligent in not taking the usual precautions of placing warning signs, putting down a mat, and mopping up water at the entry to a residence hall during a storm.[383] The court found that the plaintiff was 40% negligent when he slipped and fell, in view of the fact that he was familiar with the conditions of the entry way during rain. A Massachusetts student amputated his finger when it caught on a ladder he jumped off of to intercede in a fight, that developed during an intramural floor hockey game.[384] The court held that the ladder company could bring a negligence claim against the state college for failing to properly supervise the activity and keep students off the ladder. A New York employee sued the institution for lead poisoning acquired from paint in the employer-provided residence.[385] The institution sued its insurance contractor for coverage, and the court found that both the injury from pollutants and employee exclusions in the contract were absolute.

A California court ruled that California courts had jurisdiction in a case against Connecticut parents for negligent supervision of their minor son, a California college student. Residents of an apartment brought this action after an attempted break-in by the intoxicated minor. A student, raped in the restroom of a women's dining hall, brought negligence charges against both the assailant and the college.[386] A jury found in favor of the defendant; however, the court, on appeal, ordered a new trial. The court found that the plaintiff had not been provided with the names and addresses of the defendant's witnesses, and the defense attorney wrongly stated during opening comments that the assailant had not been charged with a felony.

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[379] *See* The Yearbook of Education Law 1993 at 219; Freeman v. Hertzoff, 577 N.Y.S.2d 839 (N.Y. App. Div. 1992).

[380] Lamorie v. Warner Pacific College, 850 P.2d 401 (Or. Ct. App. 1993).

[381] Kline v. Ohio Univ., 610 N.E.2d 1205 (Ohio Ct. Cl. 1990).

[382] Weigl v. Quincy Specialties Co., 601 N.Y.S.2d 774 (N.Y. Sup. Ct. 1993).

[383] Bergeron v. Southeastern La. Univ., 610 So. 2d 986 (La. Ct. App. 1992).

[384] Economy Eng'g Co. v. Commonwealth, 604 N.E.2d 694 (Mass. 1992).

[385] Oates *ex rel.* Oates v. State, 597 N.Y.S.2d 550 (NY Cl. Ct. 1993).

Educational Malpractice

A Colorado court dismissed an educational malpractice claim against a proprietary school, finding that the education process made it impossible to apply a reasonable standard of care to the institution.[387] However, the plaintiff's breach of contract claims of misrepresentation of the curriculum and employability after completion of the program were remanded for trial. A Kansas court reached a similar finding in an educational malpractice claim surrounding a university's court reporting program.[388] In this case, the students sued under the State Consumer Protection Act, but failed to prove causation, which was required to recover for the institution's false statements that the program was accredited.

Medical Malpractice

A number of medical malpractice suits involved university teaching hospitals. A North Carolina court ruled that the university and the physician did not have a duty to inform the patient of the qualifications of the assisting medical student.[389] The consent form for the operation contained authorization and informed the plaintiff of the use of assisting medical students during the procedure. A Delaware court found that the two-year statute of limitations had expired in a suit over the misdiagnosis of the cause of the patient's medical problems (i.e., a prescribed oral contraceptive).[390]

Workers' Compensation

A Florida court disqualified the university's former attorney in a claim representing the university's workers' compensation insurance carrier.[391] The carrier was seeking reimbursement from the university for a

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386. Jamshid-Negad v. Kessler, 19 Cal. Rptr.2d 621 (Cal. Ct. App. 1993).
387. Tolman v. Cencor Career Colleges, 851 P.2d 203 (Colo. Ct. App. 1992).
388. Finstad v. Washburn Univ. of Topeka, 845 P.2d 685 (Kan. 1993).
389. Bowlin v. Duke Univ., 423 S.E.2d 320 (N.C. Ct. App. 1992).
390. Greco v. University of Del., 619 A.2d 900 (Del. 1993).
391. University of Miami v. Dansky, 622 So. 2d 613 (Fla. Dist. Ct. App. 1993).

workers' compensation claim. A Texas court dismissed a suit filed untimely after the Industrial Accident Board made an award in the on-the-job death of a community college employee.[392]

A Kansas court ruled that the injury suffered by a custodian was 50% permanent partial disability.[393] The custodian's refusal to participate in vocational rehabilitation, pending the outcome of this claim, was refusal without good cause, allowing the university to suspend payment of temporary total compensation. A California workers' compensation appeals board found that a criminal, who was injured while performing his sentence of community service at a university, was entitled to workers' compensation.[394] On appeal, however, the court ruled that he was a volunteer rather than an employee and was not therefore entitled to workers' compensation benefits. An Ohio court, on appeal from a review board, ruled that the employee had failed to show that a lung disease arose out of employment or was an occupational disease.[395] A Georgia court ruled that the statute of limitations did not bar an increase in the workers' compensation for a knee injury where the severity of the injury was not originally diagnosed.[396] A New York court ruled that a student intern, injured during unpaid mandatory field work required for the degree, was an employee qualified to seek workers' compensation benefits.[397] Finally, a university painter, who was injured and could no longer climb a ladder, stoop, or crawl, was employed for several years but was then terminated due to the resentment of other workers. He then sued alleging handicap discrimination and attempted to reopen his workers' compensation settlement.[398] The court ruled that misrepresentations in the settlement claim allowed the agreement to be set aside and the case reopened.

Contract Liability

The existence of a contract and breach of contract are some of the claims brought involving contracts. Insurance contracts and bidding procedures for construction contracts were also litigated. Liability for faulty workmanship and strict liability claims round out this section.

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[392] Roberts v. Tarrant County Junior College, 842 S.W.2d 835 (Tex. [illegible]t. App. 1992).

[393] Scharfe v. Kansas State Univ., 848 P.2d 994 (Kan. Ct. App. 1992).

[394] California State Univ., Fullerton v. Workers' Compensation Appeals Bd., 21 Cal. Rptr.2d 50 (Cal. Ct. App. 1993).

[395] Koons v. University of Akron, 611 N.E.2d 458 (Ohio Ct. App. 1992).

[396] Wesleyan College v. Mains, 428 S.E.2d 577 (Ga. Ct. App. 1993).

[397] Olsson v. Nyack Hosp., 598 N.Y.S.2d 348 (N.Y. App. Div. 1993).

[398] Lowrey v. University of Tex. Medical Branch at Galveston, 837 S.W.2d 171 (Tex. Ct. App. 1992).

The existence of a contract was raised in an Alabama case.[399] The court found that the University of Alabama had entered into a partnership with a corporation to investigate the feasibility of developing a geriatric research facility, but never entered into an agreement to actually proceed to build the facility. In a Wisconsin claim for additional costs in the construction of a building for the state, the contractor invoked the arbitration clause in the contract and the state objected.[400] The court found that the state could not be made a party to arbitration where the Department of Administration lacked the power to bind the state to arbitration.

Breach of contract was alleged after the failed purchase of an electronics institute. The court ruled that the purchase agreement was breached when the owner failed to transfer the institute and failed, as stipulated in the agreement, to get the approval of a regulatory agency so that enrolled students could qualify for financial aid.[401] An Ohio court found that a university had breached a building contract with a construction company when it hastily entered into the construction of a building with inadequate plans, defective designs, and verbal change orders, causing the contractor to experience cost overruns.[402] In a subsequent decision on the interest to be paid on the damage award, the court ruled that prejudgment interest would be calculated annually.[403] A Florida appellate court ruled that the university should have been awarded damages for a failed construction project on the basis of the doctrine of joint and several liability instead of total damages, less 5% for comparative negligence.[404] The university was also entitled to prejudgment interest from the date the project was to be completed.

Insurance contracts were also litigated. A Missouri court found that a faculty member's personal property, damaged in a university theater fire, was covered by the university's insurance.[405] In Alabama the court found that a life insurance company was not a fiduciary to the failed employee benefits plan when the rates charged to enrolled employees were set by another insurance corporation.[406] A Massachusetts court declared that an insurance company was responsible for the defense of a university in an action by the purchaser of the property to clean up a hazardous waste site, even when the policy period had expired.[407] The property damage which occurred during the policy period did not manifest itself until after the expiration of the policy period. Finally, a university insurer challenged its responsibility for a malpractice claim against a university health service physician over medical procedures performed on a student in the physician's private practice office.[408] The court ruled that material issues existed as to the insurance company's responsibility in the claim and reversed the summary judgment award.

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[399] Mims, Lyemance, & Reich v. UAB Research Found., 620 So. 2d 594 (Ala. 1993).

[400] State v. P.G. Miron Constr. Co., 498 N.W.2d 889 (Wis. Ct. App. 1993).

[401] WKG-TV Video Elec. College v. Reynolds, 618 So. 2d 1023 (La. Ct. App. 1993).

[402] Valentine Concrete v. Ohio Dep't of Admin. Servs., 609 N.E.2d 623 (Ohio Ct. Cl. 1991).

[403] Valentine Concrete v. Ohio Dep't of Admin. Servs., 609 N.E.2d 645 (Ohio Ct. Cl. 1991).

[404] University of Miami v. All-Pro Athletic Surfaces, 619 So. 2d 1034 (Fla. Dist. Ct. App. 1993).

[405] Peters v. Employers Mutual Casualty Co., 853 S.W.2d 300 (Mo. 1993); Baker v. United Olympic Life Ins. Co., 616 So. 2d 1163 (Fla. Dist. Ct. App. 1993).

[406] Blackwelder v. Alabama Junior Community Colleges, 623 So. 2d 1089 (Ala. 1993).

Bidding procedures were at issue in a New York case where the contract was awarded to the second lowest bidder.[409] The court found that failure to notify the unsuccessful lowest bidder of performance concerns and a timely opportunity to address those concerns were obligations of the institution. A Florida paint contractor and lowest bidder on a university project, brought action when the university rejected all bids because it discovered lead in the paint to be removed.[410] The court ruled that a hearing officer exceeded the scope of a bid protest when he ruled that the bidder assumed the risk of the presence of lead and must absorb the cost for removal. The court also awarded the bidder the cost to prosecute this matter. A North Carolina court found that a food service company had responded to a request for a proposal (RFP) when it gave prices for tea and salad which were in different increments than asked for in the RFP.[411] A community college violated the statutes requiring advertising for bids on public projects when the terms for eligibility to bid on their restoration project included the requirement of experience over the past five years in restoring a building on the National Register of Historic Places.[412]

Procedural issues in adjudicating a contract dispute were raised in a Rhode Island case on appeal. The case involved a university's claim that the rust inhibiting paint used on a research vessel's ballasts by a contractor did not adhere, and therefore, had to be redone by another company. The lower court ordered a judgment in favor of the contractor.[413] The First Circuit Court ruled that the University of Rhode Island is a citizen of the state for diversity purposes, allowing the federal district court jurisdiction in this matter.[414] A New York university brought suit against a building contractor for design and construction defects when the building facade began falling off. The court ruled that the university had a negligence claim against the contractor but not a strict product liability claim.[415]

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[407] Trustees of Tufts Univ. v. Commercial Union Ins. Co., 616 N.E.2d 68 (Mass. 1993).

[408] National Union Fire Ins. Co. of Pittsburgh, Pa. v. Insurance Co. of N. Am., 590 N.Y.S.2d 463 (N.Y. App. Div. 1992).

[409] LaCourte Elec. Constr. & Maintenance. v. County of Rensselaer, 590 N.Y.S.2d 26 (N.Y. 1992).

[410] Feimster-Peterson v. Florida A & M Univ., 613 So. 2d 1333 (Fla. Dist. Ct. App. 1992).

[411] Professional Food Servs. Management v. North Carolina Dep't of Admin., 426 S.E.2d 447 (N.C. Ct. App. 1993).

[412] Construction Contractors Ass'n of Hudson Valley v. Board of Trustees, Orange County Community College, 600 N.Y.S.2d 953 (N.Y. App. Div. 1993).

[413] *See* THE YEARBOOK OF EDUCATION LAW 1991 at 231, University of R.I. v. A.W. Chesterton Co., 721 F. Supp. 400 (D.R.I. 1989).

Deceptive Practices

An Alabama proprietary school was charged with fraud in the misrepresentation of its cosmetology program. The student was awarded both compensatory and punitive damages.[416] An Arkansas student was awarded punitive damages for a proprietary school's misrepresentation of a medical office assistant program and the job opportunities upon completion of the program.[417] A New York court found that a private vocational school breached an enrollment contract with a student when it failed to fully inform him of its refund policy and his financial obligations under the federal loan program, and well as its failure to provide qualified instructors for the classes offered.[418] An Oregon student successfully brought an Unlawful Trade Practices Act claim against a proprietary institute for misrepresentation of employment placement rates upon completion of the program.[419] However, a New York student unsuccessfully claimed fraud against a dental school.[420] The court found that language in the school's brochures, cautioning students that licensing exam eligibility varies from state to state and giving an address to consult with the American Dental Association for further information, did not guarantee eligibility in all states upon completion of the dental program.

Indemnification

A campus police officer and the institution faced a wrongful death charge when a motorcyclist lost control of his vehicle while being pursued by the campus police.[421] The police officer sought attorney fees for private legal counsel retained for his defense in this litigation. The court found that the insurer had not breached its agreement to defend the policeman, and his attorney fees claim was denied.

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[414] University of R.I. v. A.W. Chesterton Co., 2 F.3d 1200 (1st Cir. 1993).

[415] Trustees of Columbia Univ. v. Gwathmey Siegel & Assocs. Architects, 601 N.Y.S.2d 116 (N.Y. App. Div. 1993).

[416] Phillips Colleges of Ala. v. Lester, 622 So. 2d 308 (Ala. 1993).

[417] Delta Sch. of Commerce v. Harris, 839 S.W.2d 203 (Ark. 1992).

[418] James v. SCS Business & Technical Inst., 595 N.Y.S.2d 885 (N.Y. Civ. Ct. 1992).

[419] Beckett v. Computer Career Inst., 852 P.2d 840 (Or. Ct. App. 1993).

[420] Abraham v. New York Univ. College of Dentistry, 593 N.Y.S.2d 229 (N.Y. App. Div. 1993).

[421] Lusk v. Imperial Casualty & Indemnity Co., 603 N.E.2d 420 (Ohio Ct. App. 1992).

Antitrust Law

The leadoff case involves a group called the Ivy Overlap Group, an organization of ivy league universities established with the objective of setting family contributions for financial aid purposes for commonly admitted students. The effect of this was to eliminate the use of financial aid awards as a student recruitment tool and, in effect, to disperse financial aid awards among a larger number of students. The federal district court found this to be a violation of the Sherman Act.[422] The court found the agreement to be price fixing and restraint of trade and used the "abbreviated reason analysis" to reach these findings. The Third Circuit Court of Appeals found that the "full rule of reason analysis" must be used and reversed and remanded the case.[423] The court also found that the nature of higher education and the agreement were such that the agreement actually encouraged more competition and was in the best interest of the consumer because it made these institutions available to a greater number of economically disadvantaged, but academically strong, students. On remand, the district court was ordered to investigate all aspects of the agreement under the full rule of reason analysis.[424]

The Tenth Circuit Court of Appeals found that the soil testing services of a state agricultural college extension division did not violate the Sherman Act by monopolizing certain tests.[425] A federal district court found that officials of a Utah public university were immune from federal antitrust liability and cited *Parker v. Brown*,[426] decided by the Supreme Court.[427] Rhode Island students brought claims characterized by the court as "everything but the kitchen sink"[428] against the university and its student health care provider and insurer for a plan they charged violated the Sherman Antitrust Act among others. The court found that the plan allowed students to opt for comparable insurance coverage; waived health center student fees as long as the comparable plans covered certain procedures; and automatically enrolled and charged the student for the university health insurance plan unless the student showed proof of comparable coverage. However, the plan was not found to have violated the Sherman Act.

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[422] *See* THE YEARBOOK OF EDUCATION LAW 1993 at 221, United States v. Brown Univ., 772 F. Supp. 241 (E.D. Pa. 1991).

[423] United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993).

[424] *Id.* at 678.

[425] Porter Testing Lab. v. Board of Regents for the Okla. Agric. & Mechanical Colleges, 993 F.2d 768 (10th Cir. 1993).

[426] 317 U.S. 341 (1943).

[427] Pharmaceutical & Diagnostic Servs. v. University of Utah, 801 F. Supp. 508 (D. Utah 1990).

[428] Lee v. Life Ins. Co. of N. Am., 829 F. Supp. 529, 534 (D.R.I. 1993).

Patents

An Indiana corporation held exclusive license and a California university owned the patent on recombinant DNA technology in the development of a growth hormone. When another biotechnology company sought a declaratory judgment in Indiana on whether the exclusive licensing was a violation of federal antitrust and state tort laws, the federal district court dismissed the claim. The California university filed a patent infringement claim against the biotechnology company in federal district court in California. The United States Court of Appeals ruled that the district court erred in dismissing the declaratory judgment claim and that, under patent law, the state was not immune from this action.[429] Furthermore, the court ruled that the granting of an exclusive license was not a "restraint of trade" under the Sherman Act.

In another case, an instructor who sold trade secrets of The Church of Scientology as part of a course she sold on Dynamism violated California copyright laws.[430] The court also ruled that just because the trade secrets were of a religious nature did not implicate either establishment clause or free exercise clause rights of the instructor.

Estates and Wills

In Missouri a court ruled that the reliance on a donor's pledge in securing a loan to construct a college building did not make the pledge irrevocable.[431] The personal representative of a deceased donor could and did revoke the remainder of the pledge.

A doctor, upon his death in 1927, set up a trust for his wife that, upon her death, would be given to Yale University for the construction of a hospital building to treat the "sick poor." The wife lived to be 106 years of age, passing away in 1987 and leaving $312,000 in the trust fund. Yale University sought relief from restrictions in the trust, arguing that there was not enough money to build a building, and they no longer differentiated in treatment based on economic status. The Attorney General of the state refused to grant relief, but the Connecticut Supreme Court ruled that the bequest was an "institutional fund," giving the university the right to seek relief.[432]

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[429] Genentech, Inc. v. Eli Lilly & Co., 998 F.2d 931 (Fed. Cir. 1993).

[430] Bridge Publications v. Vien, 827 F. Supp. 629 (S.D. Cal. 1993).

[431] Hannibal LaGrange College v. Langwell, 840 S.W.2d 888 (Mo. Ct. App. 1992).

[432] Yale Univ. v. Blumenthal, 621 A.2d 1304 (Conn. 1993).

A private college ceased to operate after filing for bankruptcy under chapter 7. In a will the donor had provided that her estate be liquidated, the proceeds invested in stocks and bonds, and the resulting income paid to the private college. The court, applying the doctrine of cy pres, ruled that the income from the stocks and bonds would be held as property by the settlers of the estate rather than as property of the debtor private college.[433]

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[433] *In re* Bishop College, 151 B.R. 394 (Bankr. N.D. Tex. 1993).

8

EDUCATION RELATED

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Introduction

In addition to the wide-range of cases traditionally discussed in the *Yearbook* are relevant, noneducation cases. Neither the plaintiffs nor the defendants are students, teachers, professors, administrators, school districts, or universities, but an application of the principles of law remains. Accordingly, this chapter was added last year to identify and summarize United States Supreme Court noneducation cases that examined issues with important education-related implications for educators and their attorneys.

Sex Discrimination

A former employee of a forklift company sued claiming a violation of title VII of the Civil Rights Act. She alleged that she had been a victim of sexual harassment by being subjected to insulting gender-based comments and unwanted sexual innuendos. The owner of the company would, at times, ask the petitioner and other female workers to retrieve coins from his front pants pocket, request that they pick up coins he had thrown on the floor, or make suggestive or offensive comments in front of other employees. At one point, the petitioner complained to the owner about his offensive conduct. The owner responded that he was surprised that the petitioner was offended by his comments and actions but agreed to stop. However, the conduct began anew within a short period of time. Shortly thereafter, the owner jokingly suggested that the petitioner must have promised to engage in sex with a customer in order to have successfully completed a sale. The petitioner then collected her paycheck and terminated her managerial position with the forklift company.

The district court agreed that the conduct of the owner was offensive to the petitioner and to other "reasonable women," but the court did not find the conduct to have caused psychological damage or other injury and, as a result, ruled for the company. The Sixth Circuit affirmed the decision of the lower court. The Supreme Court then granted certiorari to resolve the conflict among the circuits[1] as to the level of suffering or injury that must be endured prior to establishing that abusive conduct is actionable under title VII.

The Supreme Court, in a unanimous opinion, reversed the appeals court decision and remanded the case for further proceedings.[2] The Court recognized that title VII violations may exist even before abusive conduct adversely affects a person's psychological well-being (e.g., to the point of a nervous breakdown). Even when a discriminatory and abusive work environment does not result in serious injury, the environment may still affect other important aspects of employment (i.e., career advancement and job performance) in violation of title VII. Determining whether an environment is hostile or abusive requires an examination of all the circumstances and may include: frequency of the conduct; severity of the conduct; physical threat or humiliation from the conduct; and interference with work performance. Psychological well-being is only one factor in determining the employee's perception of abusive conduct within the work environment.

Because universities and school districts employing more than fifteen employees must demonstrate compliance with title VII, it is clear that this case has a direct application to educational institutions. Sexual harassment need not be so severe as to result in permanent injury or nervous breakdown to violate federal statute. Rather, the courts will examine all relevant information regarding frequency, severity, injury (e.g.,

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1. *Compare* Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986); and Vance v. Southern Telephone and Telegraph Co., 863 F.2d 1503 (11th Cir. 1989); and Downes v. F.A.A., 775 F.2d 288 (9th Cir. 1985); with Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).
2. Harris v. Forklift Sys., 114 S. Ct. 367 (1993).

denial of promotion, termination, creation of demeaning work environment), and the like in determining whether a "hostile" environment has been created.

Age Discrimination

A sixty-two year old employee of a paper company was fired several weeks shy of completing ten years of service with the company. The ten-year employment milestone also would have marked the point at which he would have become vested in the company pension plan. As a result of the termination, the employee brought suit claiming a violation of the Age Discrimination in Employment Act (ADEA) and the Employee Retirement Income Security Act (ERISA). In response, the employer claimed that the employee was fired for doing business with competitors, not because he was sixty-two years of age.

The district court found the paper company to have violated both the ADEA and the ERISA. Additionally, the jury found that the petitioner had "willfully" violated the ADEA, thereby giving rise to a claim for liquidated damages. Petitioners then moved for judgment notwithstanding the verdict. This motion was granted only for a related state law claim and the finding of "willfulness." On further appeal, the First Circuit affirmed the judgment of the lower court concerning the ADEA and ERISA violations, but reversed the verdict pertaining to willfulness.[3] The Supreme Court then granted certiorari for the purpose of answering two specific questions: (1) Is the ADEA violated by an employer's interference with the vesting of pension benefits?, and (2) Does the standard for liquidated damages established previously by the Court in *Trans World Airlines, Inc. v. Thurston*[4] apply to a case where the ADEA violation is an informal decision motivated by the employee's age rather than a formal, facially discriminatory policy?

Justice O'Connor, writing an opinion expressing the unanimous view of the Court,[5] held that interference with an older employee's pension benefits, benefits that would have been vested solely by virtue of the number of years of service contributed by the employee, did not implicate a violation of the ADEA by the employer. (Note that the Court did not consider whether the ADEA would have been violated had vesting been a function of age rather than years of service.) Furthermore, the Court reasoned that in order to recover liquidated damages once a violation was shown to be "willful," the employee did not have to demonstrate outrageous conduct on the part of the employer, provide evidence of the employer's motivation, show evidence that liability was direct rather than circumstantial, or prove that age was a predominant rather than a determinative factor. Rather, it must be shown that the employer knew or showed reckless disregard in violating the ADEA and was not merely negligent. This standard, as originally developed in *Thurston*, was reaffirmed to apply to all disparate treatment cases where violation of the ADEA has been alleged. Given the above, the case was then remanded to determine whether the jury had sufficient evidence to find an ADEA violation.

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[3] Biggins v. Hazen Paper Co., 953 F.2d 1405 (1st Cir. 1992).

[4] Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

[5] Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993).

Termination of an employee by a school district or institution of higher education must be based on some factor other than age to avoid violating the ADEA. The situation that existed in the case of *Hazen Paper Company v. Biggins*,[6] the termination of an older employee about to be vested, would not commonly occur in public schools since teachers are generally vested in retirement plans after approximately five years and employment generally begins at a comparatively early age. However, the situation may be quite different for K-12 noncertificated employees and for higher education faculty who generally start careers in the professorate later in life. Termination of an employee who is obviously close to vesting in pension benefits does not necessarily imply that the employer has violated the ADEA, however. The courts will consider all related facts in determining whether age was the motivating reason, or whether other permissible bases existed.

Race Discrimination

A black corrections officer had a satisfactory employment record for six years prior to a change in supervisors. Soon thereafter, the employee began to experience severe disciplinary measures, including a reprimand, demotion, and ultimate termination. The position held by the former employee was filled by a white male. The terminated employee then brought action under title VII claiming that the discipline and firing he received were the result of race discrimination.

The district court ruled on behalf of the employer because the respondent had failed to show that the "crusade" against him was racially motivated.[7] The district court reasoned that the respondent had established the required prima facie case and that the rebuttal by the petitioners did not represent the "real" reasons for the respondent's demotion and termination. However, the respondent failed to meet the burden of proving that the adverse employment decisions were based on race.

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[6] *Id.*

[7] Hicks v. St. Mary's Honor Center, 756 F. Supp. 1244 (E.D. Mo. 1991).

The Eighth Circuit agreed with the trial court that a prima facie case had been established but disagreed that the petitioner (employer) was entitled to judgment.[8] Accordingly, the appeals court reversed and remanded the case based on reasoning that once the respondent proved the petitioner's rebuttal not to be true, the respondent was entitled to judgment without regard to any further proof required on his part (i.e., he was required to prove that the rebuttal did not represent the "real" reasons, but he was not required to prove that race was the motivating factor or actual cause for the adverse decisions).

The Supreme Court granted certiorari to determine whether a finding could be made for a plaintiff who had not proven race discrimination by a preponderance of the evidence when the rebuttal had been found not to be true. The decision of the High Court[9] reinforced the practice that once a prima facie case has been established, and a rebuttal has been presented, the proof that racial discrimination exists continues to rest with the plaintiff. The Court noted that pretext cannot be proven unless it is shown that the proffered reason was false *and* that discrimination was the true cause of the termination.

This case applies to all levels of education and employment affected by title VII and requires not only that the rebuttal be proven false, but that discrimination be shown to be the motivating force for the employer's actions. It is not enough that the employer's rebuttal was not believed. The courts will not award damages based on the assumption that discrimination must have motivated the employer when the employer's proffered reasons were not accepted.

In a second race-related case, the city of Jacksonville, Florida passed an ordinance that afforded preferential treatment to minority-owned businesses in the award of city contracts. As a result, an organization of general contractors, with few members that would qualify as Minority Business Enterprises (MBE), filed a claim in district court citing that the ordinance violated the equal protection clause of the Fourteenth Amendment. Over time, the district court ruled twice for the general contractors, but the court of appeals twice reversed and twice remanded on the basis that (1) irreparable injury could not be shown, and (2) the petitioner lacked standing because it had not demonstrated that any of its member contractors would have received the contracts "but for" the preferential treatment afforded MBEs. The Supreme Court granted certiorari to resolve a conflict between the circuit courts on this matter.[10]

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[8] Hicks v. St. Mary's Honor Center, 970 F.2d 487 (8th Cir. 1992).
[9] St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993).

Twenty-two days after the grant of certiorari, Jacksonville repealed the MBE ordinance and replaced it with the African-Americans and Women's Business Enterprise Participation ordinance. This new ordinance was less limiting in its application and provided alternative methods for achieving participation goals for the city. A motion to dismiss the case was denied, however, and the Supreme Court proceeded. Examination of an earlier case decided by the Supreme Court, *Regents of the University of California v. Bakke*,[11] was included in this decision because the latter case was closely analogous to the minority issue at hand. In the *Bakke* decision, Justice Powell concluded that the "injury" sustained by Bakke was the medical school's decision not to permit him to compete for all of the openings in the class because of his race. Along this same line of thinking, the Supreme Court supported the proposition that denying a contractor, who was otherwise ready, the right to bid on all contracts was injurious and that the contractor need not also have the burden of proving that a particular contract would have been forthcoming "but for" the barrier imposed by the ordinance. Accordingly, the loss of the right to compete on equal footing was an "injury in fact" and a violation of equal protection.

This case has a direct application to both K-12 and higher education in that both are, at times, involved in set-aside programs. It is clear from the above case that most, if not all, such practices will be disallowed. If contractors or vendors are not allowed to compete on an equal basis for school and university contracts due to the racial composition of their ownership/workforce, an equal protection violation will likely exist. Additionally, plaintiffs in such cases will not be required to prove that they would have received certain contracts notwithstanding set-aside restrictions, but rather will be required only to show that they were not allowed to compete.

Bargaining

President of a Deputy Sheriffs Union, representing approximately 400 members, brought action against the county and its sheriff claiming violations of the Fair Labor Standards Act (FLSA). The alleged violations stemmed from the county's practice of paying for overtime work with compensatory time rather than with overtime pay, although this practice was in accordance with the terms and conditions of employment specified in individual contracts signed by each employee. The petitioners contended that an agreement with their representation was necessary for the institutionalization of such an arrangement in accordance with subclause (i) of subsection 7(*o*)(2)(A) of the FLSA.[12] This subsection allowed for the use of compensatory time pursuant to a collective bargaining agreement, memorandum of understanding, or any other agreement between management and a representative of the employees. Texas law prohibited the Deputy Sheriffs Union from entering into a collective bargaining agreement with the county, but the deputy sheriffs had a union representative who claimed that the county was in violation of the FLSA for failing to develop an agreement regarding compensatory and overtime pay.

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[10] *Also compare* Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S.___ (1993); O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992); and Coral Constr. Co. v. King County, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 875 (1992).

[11] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

The district court disagreed with this line of reasoning and issued summary judgment for the county.[13] The court found subclause (i) not to be applicable in states such as Texas that prohibit collective bargaining and acknowledged that the existing Deputy Sheriffs Union was not recognized as a bargaining unit by the county. The lower court decision was affirmed by the appellate court, and the Supreme Court granted certiorari to resolve the conflict among the circuits over the scope of subclause (i).

The Supreme Court affirmed the judgment of the appellate court in a unanimous opinion written by Justice Stevens[14] after interpreting subclause (i) to be applicable only in situations in which the employees' representative is authorized by law to enter into an agreement. The Court reasoned that without lawful authority to negotiate agreements, the representative is not authorized to make agreements between employees and the public agency, and that employees are therefore responsible for pursuing individual agreements with the employer.

In states where public sector collective bargaining is not permitted, school district employees are responsible for signing individual contracts. Even when the school employees have organized themselves into a union and have selected a representative, that individual does not have the authority to make collective arrangements or agreements for union members with the local school board. As a result, employers in nonbargaining states have the discretion to provide compensatory time rather than additional pay.

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[12] Fair Labor Standards Amendments of 1985, 99 Stat. 790, 29 U.S.C. § 207(*o*).

[13] Merritt v. Klevenhagen, Civ. Action No. 88-1298 (S.D. Tex., Sept. 5, 1990).

[14] Moreau v. Klevenhagen, 113 S. Ct. 1905 (1993).

Church and State

The city of Hialeah sought to prohibit the establishment of a house of worship serving the Santeria religion within its city limits. The Santeria religion, a fusion of a traditional African tribal religion with Roman Catholicism, used animal sacrifices for a variety of rituals and ceremonies. Immediately after the announcement by Santeria to establish a house of worship in Hialeah, the city began passing ordinances related to animal sacrifice. Over a period of the next several months, four separate ordinances were passed by city council. The Church claimed that the city, by passing such restrictive ordinances obviously aimed at prohibiting the practice of the Santeria religion, had violated its rights under the free exercise clause.

The district court[15] held that the city had not violated the free exercise clause and found four compelling interests to justify the city's actions in protecting governmental and religious interests: (1) animal sacrifices posed a health risk to the participants and the general public; (2) children who witnessed the sacrifices may be injured emotionally; (3) animals should not be subjected to cruelty and unnecessary killing; and (4) animal slaughter should be restricted to areas of the city zoned for slaughterhouses. The appellate court[16] affirmed the constitutionality of the ordinances. This decision was subsequently reversed by the Supreme Court,[17] however, because the ordinances did not meet the requirements of the free exercise clause: neutrality, general applicability, and advancement of compelling governmental interests. The ordinances were held to be motivated by religious beliefs, overbroad, and underinclusive.

Free exercise claims are not new to education. In fact, at both higher education and K-12 levels, related claims have been common over the years. Disputes have ranged from the right to pray, to distribute Bibles, to indoctrinate, to have club meetings, to use school facilities for worship purposes, to wear certain types of religious clothing, to have religious paintings and pictures in the classroom, to have a Bible located on top of one's desk, and the like. As in the above case, educational institutions and the courts have attempted to draw a fine line between the free exercise clause and other state and federal laws, including the establishment clause. In doing so, related regulations must not be overbroad or underinclusive, religious freedom must be protected, and caution should be exercised to avoid establishment. Accordingly, schools and universities should not attempt to censor specific religious beliefs or to restrict the free exercise rights of its employees or students, unless compelling governmental interests are present.

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[15] Church of the Lukumi Babalu Aye v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989).

[16] Church of Lukumi v. City of Hialeah, 936 F.2d 586 (11th Cir. 1991).

[17] Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993).

Free Speech

The respondent in this case was found guilty of aggravated battery. The traditional two-year sentence for aggravated battery was enhanced to four years because his actions in committing the crime were proven to be racially motivated. The respondent and several of his friends had been discussing a scene from the motion picture "Mississippi Burning," in which a young black boy was beaten by a white man. The respondent then asked his friends if they would like to "move on some white people." Soon thereafter, a young white boy appeared on the opposite side of the street and the respondent encouraged his friends to "go get him." The boy was robbed, beaten severely, and rendered unconscious where he remained in a coma for four days. Because the respondent had intentionally selected his victim according to race, state law allowed for an "enhancement." The respondent challenged the state statute as a violation of his First and Fourteenth Amendment rights. The Wisconsin Court of Appeals rejected his claim, but the decision was reversed by the state supreme court. The state's high court reasoned that Wisconsin could not criminalize bigoted thought with which it disagreed and that the applicable law was unconstitutionally overbroad.

The United States Supreme Court reversed the state decision and upheld Wisconsin's enhancement law.[18] In developing its position, the Court noted that a defendant's motive for committing a crime was an important factor (presumably, one of many factors) that may be considered in sentencing. The Court also observed that from the state's perspective, bias-motivated offenses tend to incite community unrest, result in retaliation, and inflict emotional harm to a greater degree than do other offenses, thereby justifying a greater penalty. Additionally, the Court distinguished this decision from its recent *R.A.V. v. City of St. Paul* decision.[19] In the latter, the conduct (i.e., free speech) was protected by the First Amendment, while in the present case, the conduct (i.e., physical assault) was unprotected. In disagreeing with the defendant's (Mitchell's) claim that the statute was overbroad because of the limiting effect it placed on free speech, the Court recognized that the intent of the statute was punishment of obvious discriminatory conduct rather than free expression.

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[18] Wisconsin v. Mitchell, 473 N.W.2d 1 (Wis. Ct. App. 1991), *rev'd*, 485 N.W.2d 807 (Wis. 1992), *rev'd*, 508 U.S. ____ (1993).

[19] R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

There is only a partial application of this case to schools and universities. Enhancement of disciplinary measures is supported by this case when unprotected conduct (e.g., physical violence) has occurred, but the same penalties do not apply to conduct that is protected (e.g., free speech). Even when protected speech results in racial slurs or other racially directed language, the speech continues to be protected unless it becomes disruptive to the educational process or constitutes fighting words. Even then, related policies may prove difficult to draft and enforce and may also be challenged as overbroad, underinclusive, or facially unconstitutional.[20]

In a second free speech case, two companies publishing magazines that were distributed free of charge on newsracks throughout Cincinnati had their permits revoked by the city in 1990. The permits were revoked on the grounds that the municipal code prohibited distribution of these types of commercial publications (i.e., commercial handbills) on public property. Following the revocation, the two companies commenced litigation for declaratory and injunctive relief under the First Amendment. In district court, the city of Cincinnati was found to be in violation of the First Amendment. The city was permitted to regulate dispensing of publications in support of its substantial interests to promote safety and aesthetics, but the burden of establishing a reasonable fit between these purposes and the net effect (no distribution) was not met by the city. During the appeal, the city argued that the magazines represented commercial speech, and were, therefore, afforded a lesser protection than other forms of constitutionally guaranteed speech. The court of appeals disagreed with the city's argument and held that regulations pertaining to the lesser status of commercial speech can be upheld only when designed to (1) prevent false or misleading advertising, or (2) regulate the manner of distribution.[21] Accordingly, the appellate court upheld the district court decision and concluded that the small gains in safety and beauty that would be obtained by removing the newsracks were unjustified.

The United States Supreme Court affirmed the decision of the Sixth Circuit and disagreed with the city's argument that prohibiting the use of newsracks did not limit speech any more than necessary and that its restriction on the time, place, and manner of distribution was valid.[22]

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[20] Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989); and UMW Post v. Board of Regents of the Univ. of Wis., 774 F. Supp. 1163 (E.D. Wis. 1991).

[21] Discovery Network v. City of Cincinnati, 946 F.2d 464 (6th Cir. 1991).

[22] City of Cincinnati v. Discovery Network, 113 S. Ct. 1505 (1993).

The Court emphasized that the excessive importance the city placed on distinguishing between commercial and noncommercial speech had very little to do with the interests asserted by the city (i.e., aesthetics and safety) in revoking the newsrack permits.

Public universities may regulate the time, place, and manner of distribution of commercial and noncommercial products, but they may not censor particular messages, or otherwise limit "protected" speech. Public schools possess greater censorship rights, however, given the age and maturity level of their students. Material that could be distributed on a university campus with little or no controversy, may be disruptive in a K-12 setting, be unsuitable for the population, or be sufficiently vulgar as to be legally banned. Additionally schools and universities may need to limit the quantity of material distributed, given their space limitations and aesthetic considerations. A rotation of material based on a first-come, first-displayed basis with limits placed on display time will presumably meet constitutional scrutiny.

Search and Seizure

A small lump of cocaine was detected through the sense of touch by a police officer conducting a search for weapons on a respondent leaving a suspected "crack house." Upon feeling what appeared to be an object resembling cocaine wrapped in cellophane inside a pocket in the respondent's nylon jacket, the police officer removed the contraband from the pocket and submitted it into evidence on a criminal charge that resulted in a verdict of guilty for possession of a controlled substance. The officer conducting the patdown search admitted that he continued to manipulate the object inside the respondent's jacket until he determined that the "lump" was probably contraband. He also admitted to continuing the search even after he was satisfied that the respondent was not carrying a weapon.

At the trial court level, the respondent requested a motion to suppress the cocaine found on his person as evidence based on a violation of his Fourth Amendment rights. The trial court concluded that the police officer was justified in both stopping the respondent for an investigation into his involvement in criminal activity and frisking him to determine if he was carrying a weapon. Therefore, the officer was credited with performing a lawful search, notwithstanding the fact that it resulted in the warrantless seizure for contraband. The decision of the trial court was reversed by the Minnesota Court of Appeals.[23] The appellate court agreed that the action of the police in stopping and performing a patdown search of the respondent was justified in light of the presumption that the respondent might be armed and dangerous, but the court did not agree with the officer's actions in seizing the cocaine without a warrant. In developing its position, the court reasoned that merely because the police officer had a justifiable reason to perform a patdown search for weapons, this clearly did not justify the right of the officer to use his sense of touch to identify other types of contraband that the respondent might possess. The Minnesota Supreme Court affirmed the appellate decision and refused to adopt the "plain feel exception" to the warrant requirement.[24] The state high court reasoned that the sense of touch, as performed in the present case, was far more intrusive to personal privacy than what was allowed under the Fourth Amendment.

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[23] State v. Dickerson, 469 N.W.2d 462 (Minn. Ct. App. 1991).

On further appeal, the United States Supreme Court granted certiorari to determine whether the seizure of contraband detected through the sense of touch during a protective patdown search was permitted under the Fourth Amendment. The Court reasoned that a protective search, based on reasonable suspicion and without a warrant, must be limited to that which is necessary to discover weapons, and may not proceed further.[25] If contraband were discovered during such a restricted search, it may be seized and submitted as criminal evidence in a court of law. Suppression would not be required, assuming the search was justified at its inception and no more intrusive than necessary for the discovery of weapons. In the present case, however, the search was not found to be limited to the detection of weapons, and was therefore held to violate respondent's Fourth Amendment rights. In fact, the officer formed the opinion that the lump was crack cocaine only after squeezing, sliding, and manipulating the item in the respondent's pocket.

Police forces in existence on public college campuses are required to uphold the same standards for conducting and terminating searches as are other police and thus must limit the intrusiveness of warrantless "patdown" searches to that which is necessary for the production of weapons such as that discussed above. However, the standard is applied in a slightly different manner in public schools. When a search has been justified by reasonable cause, a student could be required to submit to a patdown search, a search of outer clothing, or even a more intrusive body search. However, as the search becomes progressively more intrusive, there will be a greater and greater need for the aggregated evidence to justify the search as reasonable. The search needs to be justified at its inception and no more intrusive than is necessary.

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[24] State v. Dickerson, 481 N.W.2d 840 (Minn. 1992).

[25] Minnesota v. Dickerson, 113 S. Ct. 53 (1993).

Eighth Amendment

A prisoner incarcerated in the Nevada penal system was assigned to a cell with another inmate who smoked five packs of cigarettes per day. The respondent sought relief and damages for subjecting him to cruel and unusual punishment in accordance with protections under the Eighth Amendment for jeopardizing his health. The jury examined the case in light of two issues: (1) whether a constitutional right to housing in a smoke-free environment exists, and (2) whether the defendants were deliberately indifferent to the respondent's serious medical needs. The magistrate concluded that a right to a smoke-free environment did not exist for the respondent but that the respondent could state a claim for deliberate indifference to serious medical needs if he could prove that he had medical problems traceable to the cigarette smoke or that there had been deliberate indifference to existing smoke-related medical problems. However, in the present case the inmate was unable to prove either of the aforementioned, and a directed verdict was granted to the defendants/petitioners.

On appeal, the appellate court[26] supported the issuance of the directed verdict on the deliberate indifference issue and also ruled that the defendants were immune from liability because there was no law imposing liability for exposing prisoners to environmental tobacco smoke (ETS). However, the court further ruled that the respondent had stated a valid claim under the Eighth Amendment due to his involuntary exposure to ETS and possible harm to his future health. Further appeal of these issues was made to the Supreme Court. The High Court vacated the decision of the appellate court, and the case was remanded for further consideration.[27]

On remand, the appellate court continued to support the respondent's claim of cruel and unusual punishment under the Eighth Amendment based on the objective component that the prisoner was being exposed to levels of ETS that could harm his health.[28] Once again, the petitioner sought review of the case by the Supreme Court contending that the decision of the Ninth Circuit was in error and in conflict with a decision from the Tenth Circuit Court of Appeals.[29]

The Supreme Court subsequently affirmed the decision of the Ninth Circuit stating that the respondent had a cause of action under the Eighth Amendment by his exposure to ETS when coupled with deliber-

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26. McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991).
27. Helling v. McKinney, 112 S. Ct. 291 (1991).
28. McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992).
29. Clemmons v. Bohannon, 956 F.2d 1523 (10th Cir. 1992).

ate indifference."[30] But the High Court also affirmed the circuit court's decision to remand the case to the district court to provide an opportunity for the respondent to prove his allegations prior to determining whether he was entitled to a remedy. The Court argued that proof of an Eighth Amendment violation in this case necessitated both objective and subjective standards. The objective standards required proof of exposure to unreasonably high levels of ETS as well as proof that the risk endured was far beyond an acceptable level tolerated by society. Note, however, that the respondent was moved to another prison and was no longer directly at risk to the ETS of his cellmate, making the objective standards difficult to support. Furthermore, the Court opined that the subjective factor of deliberate indifference would be difficult to prove since the prison authorities had adopted a smoking policy in the interim.

Although schools and universities are not in the business of incarcerating individuals, there are times when people are institutionalized against their will. Many of these individuals, particularly those between the ages of birth-to-twenty-one, receive educational services from local school districts and service providers. Districts are responsible for providing appropriate programming and may also be responsible for insuring that the environment in which the children have been placed do not impose extensive health risks (e.g., smoke, asbestos, insect or rodent repellant). If the children are exposed to a dangerous environment, either purposefully, negligently, or through deliberate indifference, suit could be filed under state tort law, even if the Eighth Amendment would not apply to this nonprisoner population.

Disability

The Indian Children's Program was funded from 1978 to 1985 by the Indian Health Service (IHS) to provide diagnostic and treatment services to Indian children with disabilities who lived in the Southwest. Funds for the program were distributed at the discretion of the IHS from the yearly lump-sum appropriations made by Congress. In 1985, the IHS discontinued direct clinical services to Indian children in the Southwest in an attempt to reallocate resources on a national level with the intent of increasing mental health services for all Indian children.

Indian children eligible to receive services from the Indian Children's Program (ICP) sought declaratory and injunctive relief against the IHS for discontinuing services. In federal district court, the respondents claimed that the cessation of services violated the federal trust responsibility to Indians, the Snyder Act, the Improvement Act, the Administrative Procedure Act (APA), various agency regulations, and the Fifth Amendment due process clause. The district court granted summary judgment for the respondents holding that discontinuing the program was subject to judicial review and ordered the program to be reinstated.[31] The district court found reason to believe that the decision to discontinue the program violated the procedural requirements of the APA including provisions regarding agency discretion,[32] notice-and-consent requirements,[33] and statements of general policy.[34] The appellate court affirmed and rejected the argument made by the IHS that the agency had discretion on whether to discontinue the ICP.[35] The court of appeals also agreed with the district court's ruling that the IHS was subject to the notice-and-consent requirements. The United States Supreme Court granted certiorari to address two questions: (1) Was the court of appeals in error in holding the action of the IHS reviewable under the APA?; and (2) Was the IHS required to abide by the notice-and-consent provisions of the APA?

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[30] Helling v. McKinney, 113 S. Ct. 2475 (1993).

The Supreme Court unanimously reversed the appellate court decision and remanded the case for further proceedings.[36] The High Court emphasized that the point of providing lump-sum funding is to allow agencies to adapt to changing circumstances and to meet statutory responsibilities in ways that appear most effective and desirable. Therefore, the IHS, as the agency with discretionary power over the distribution of funds to the ICP, had the capacity to alter distribution of the yearly lump-sum appropriation received from Congress. The action that resulted in termination of the program was deemed unreviewable under the APA. In fact, the program's termination seemed reasonable given the need to reorder priorities to allow for a broader class of Indians nationwide to receive services. Furthermore, the notice-and-consent requirement was not upheld by the Supreme Court based on an earlier decision.[37] This allowed the Court to recognize that the Service's decision to discontinue the program did not modify eligibility standards for care but only broadened the service region.

This case is consistent with those that give deference to administrative decision making where there have not been explicit limitations imposed by federal or state governments or agencies. Occasionally, special education directors, who have discretion over "flow through" funds delivered as a lump-sum, are able to differentially distribute some or all of these funds to meet a variety of changing needs within the district. In addition, agencies, with increasing frequency, are being required to reallocate resources to meet the needs of as many individuals as possible in light of decreasing levels of funding and budget restraints. Cooperative agreements between school districts and community agencies may alter as funds become more limited over time. Furthermore, decisions made as a result of school-based management often allow the application of discretionary practices by principals, teachers, and parents (working together as a team).

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[31] Vigil v. Rhoades, 746 F. Supp. 1471 (D.N.M. 1990).

[32] Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1988).

[33] Administrative Procedure Act, 5 U.S.C. § 553 (1988).

[34] Administrative Procedure Act, 5 U.S.C. § 552(a)(1)(D) (1988).

[35] Vigil v. Rhoades, 953 F.2d 1225 (10th Cir. 1992).

[36] Lincoln v. Vigil, 113 S. Ct. 2024 (1993).

[37] Overton Park v. Volpe, 401 U.S. 402 (1971).

Voting Rights

During 1993, the United States Supreme Court rendered two decisions that addressed voting rights. The first case, *Voinovich v. Quilter*,[38] developed out of a practice mandated under the Ohio Constitution requiring electoral districts for the state legislature to be reapportioned every ten years. In 1991, a proposed apportionment plan was opposed by two apportionment board members (both Democrats) in a three-to-two vote. The three remaining board members voting for the plan were Republicans. The plan had included eight majority-minority districts designed to create districts in which the majority of the members belonged to a specific minority group. The dissenting members of the apportionment board alleged this action to be a violation of section 2 of the Voting Rights Act[39] as well as the Fourteenth and Fifteenth Amendments to the United States Constitution. They suggested that "equal" voting rights would more likely be achieved through the creation of a larger number of "influence" districts (i.e., districts where black voters would remain a minority, but could continue to elect candidates of their choice with a predictable number of cross-over votes from white voters in the district) rather than providing for a more limited number of "safe" minority-dominated districts.

The district court held for the appellees (the Democrat board members) based on a provision of the Voting Rights Act that prohibited the creation of majority-minority districts unless this arrangement was necessary to remedy an existing section 2 violation.[40] The board then developed a new plan that justified the creation of the majority-minority districts and corrected "technical" errors in the plan that had been identified by the Ohio Supreme Court in an independent review. Although the revised plan contained only five majority-minority districts, the district court was not satisfied, and a special master was appointed by the court to prepare a redistricting plan. The district court concluded that the proposed and revised plans were in violation of the Voting Rights Act and the Fourteenth and Fifteenth Amendments and later ordered that the primary elections for Ohio's General Assembly be rescheduled.

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[38] Voinovich v. Quilter, 113 S. Ct. 1149 (1993).

[39] Voting Rights Act of 1965, § 2; 42 U.S.C.A. § 1973.

[40] Quilter v. Voinovich, 794 F. Supp. 695 (N.D. Ohio 1992).

The United States Supreme Court initially became involved with this case following an application by the appellants requesting a stay of the district court's orders.[41] The application for the stay was granted, and the High Court noted probable jurisdiction. Finding fault with the decision of the lower court, the Supreme Court held that section 2 did not address prohibition against any particular type of district. Instead, section 2 focused only on the effect of denying equal opportunity to a protected class to elect a candidate of choice. Accordingly, the Court reversed the judgment of the district court and remanded the case for further proceedings to determine whether the plan violated the Fourteenth Amendment by deviating from the general rule that there be equal/substantially comparable populations among legislative districts.[42] Also, the Court noted that violations under section 2 of the Voting Rights Act would prevail only when plaintiffs could show that the apportionment plan had the effect of diminishing or otherwise altering the voting strength of a particular protected class (i.e., the burden was on the plaintiff). The Supreme Court did not express a view on the relationship between the Fifteenth Amendment and redistricting aimed at promoting racial support for candidates, since the evidence directly contradicted a finding of discriminatory intent on the part of those who drafted the apportionment plan.

In a second case that also looked at voting rights, the United States Supreme Court was required to determine whether the creation of district boundary lines of dramatically irregular shape constituted a cognizable claim for unconstitutional racial gerrymandering.[43] In making this determination, the Supreme Court was required to address two complex and sensitive issues: (1) the meaning of the constitutional "right" to vote, and (2) the propriety of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups. The case developed when North Carolina, as a result of the 1990 census, became entitled to an additional (twelfth) seat in the United States House of Representatives. The plan developed by the North Carolina General Assembly initially contained one majority-black district in the northern part of the state where the largest concentrations of the state's black citizens lived. As a result of section 5 of the Voting Rights Act of 1965,[44] the jurisdiction was required to obtain either a judgment from the United States District Court for the District of Columbia to assure that the proposed change would not deny or abridge the right to vote based on race or color or an administrative preclearance from the Attorney General. The state submitted its plan to the Attorney General where formal objections were raised to the irregular boundary lines drawn in the south-central to southeastern part of the state in creating a second majority-minority district. The General Assembly enacted a revised plan that relocated the second district to the north-central region of the state using a dramatically abnormal configuration along Interstate 85. Although the Attorney General did not object to the revised plan, numerous citizens of North Carolina did object[45] by claiming that the plan was a form of unconstitutional racial gerrymandering in violation of the Fourteenth Amendment.

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[41] Voinovich v. Quilter, 112 S. Ct. 1663 (1992).

[42] Voinovich v. Quilter, 113 S. Ct. 1149 (1993).

[43] Shaw v. Reno, 113 S. Ct. 2816 (1993).

The appellants sought declaratory and injunctive relief against state and federal appellees for permitting the creation of congressional districts solely for the purpose of establishing racial concentrations, and argued that the Voting Rights Act was unconstitutional. The district court granted the federal appellees' motion to dismiss based on the Voting Rights Act vestment of jurisdiction to the District Court for the District of Columbia[46] and an earlier Supreme Court decision foreclosing any claim on the Attorney General's preclearance decision.[47] The district court also dismissed the complaint against the state appellees when the appellants failed to support an equal protection claim. The court recognized that the state's purpose was to comply with the Voting Rights Act and that the plan developed by the General Assembly did not lead to underrepresentation of white voters statewide.

The United State Supreme Court subsequently accepted the case by noting probable jurisdiction.[48] The Court agreed with the district court's action in dismissing the claims against the federal appellees, but held that there was the need for a closer examination of the claim involving unconstitutional racial gerrymandering. The Court reversed the judgment of the lower court and ultimately concluded that the equal protection clause has applicability when a reapportionment plan is so irrational on its face that it cannot be rationally understood to be anything other than an effort to segregate voters by race.

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[44] Voting Rights Act of 1965, § 5 as amended, 42 U.S.C.A. § 1973(c).

[45] Davis v. Bandemer, 478 U.S. 109 (1986); *see also* Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd* 113 S. Ct. 30 (1992).

[46] Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. 1992).

[47] Morris v. Gresette, 432 U.S. 491 (1977).

[48] Shaw v. Reno, 113 S. Ct. 2816 (1993).

Both of these cases may have application to the election of representatives for state boards of education when voting for individual candidates occurs by district or geographic area. There may also be circumstances in some states in which the outcome of local school board elections could be influenced by racial concentrations within districts designed with other than "equal numbers" in mind.

Tax Law

Dr. Solimon, an anesthesiologist, delivered services to his patients in several hospitals and used a home office to take care of all paper work, phone calls, preparation, research, etc. The doctor filed a 1983 federal income tax return claiming a number of deductions, including one for a home office (i.e., portion of the condominium payments, utilities, etc.). Dr. Solimon spent thirty to thirty-five hours per week with patients at three different hospitals, but none of the three hospitals provided him with an office.

Upon an audit of the doctor's 1983 tax return, the Commissioner of the Internal Revenue Service (IRS) disallowed the deductions taken for the home office. The denial was based on the Internal Revenue Code which allowed a taxpayer to deduct ordinary and necessary expenses associated with a trade or business,[49] but which also limited the allowable deductions that could be applied to a "dwelling unit" that was also used by the taxpayer as a residence.[50] Generally, deductions were allowed when the "dwelling unit" was used exclusively on a regular basis as the principal place of the trade or business; was a place of business used by patients, customers, or clients in the normal course of business; or was detached from the primary facility and used for business.[51]

On appeal, the tax court ruled that the home office used by Dr. Solimon was his principal place of business, and that the tax deduction was legitimate.[52] The Commissioner appealed to the Fourth Circuit,[53] and the decision of the appellate court resulted in the adoption of a new test that had been developed earlier by the tax court (i.e., a home office would quality as the principal place of business only when the office was essential to the business, no alternative space was available, and the taxpayer spent a substantial amount of time there). Note that this test failed to address whether the home office was more significant in the business operation than every other location where the business occurred.

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[49] Internal Revenue Code, 26 U.S.C. § 162(a) (1988).
[50] Internal Revenue Code, 26 U.S.C. § 208A(a) (1988).
[51] Internal Revenue Code, 26 U.S.C. § 208(c)(1) (1988).
[52] Solimon v. Commissioner of Internal Revenue, 94 T.C. 20 (1990).
[53] Commissioner of Internal Revenue v. Solimon, 935 F.2d 52 (4th Cir. 1991).

The United States Supreme Court granted certiorari to resolve the conflict generated by the comparative analysis of business related functions performed at each location. The Court reversed the decision of the appellate court[54] and proclaimed two primary considerations in deciding whether a home office was the taxpayer's principal place of business: the importance of the activities performed at each business location; and the time spent at each place of business. The Court also observed that "where goods and services were actually delivered" was a factor to consider in determining whether a particular location was the principal place of business. In the present case, the anesthesiology services were delivered in hospitals and not within the home office; the petitioner spent less time in his home office than at the hospitals; and the activities performed in the home office were less important to the business than the actual treatment provided at the hospitals.

In addition to the above, the Court noted that situations may arise in which there is no principal place of business. When this occurs, the home office would not become the principal place of business simply by default.

The above case will prove of interest primarily to professors who have historically claimed a home office deduction for work associated with writing, research, and consulting. If the home office is used to complete "university" work, it is clear that the deduction will not be allowed; however, if it is used for private business purposes (e.g., book writing, consulting, etc.) that are independent from the professor's university contract, a deduction might be possible. The standards identified above must be met, however.

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[54] Commissioner of Internal Revenue v. Solimon, 113 S. Ct. 701 (1993).

9

FEDERAL AND STATE LEGISLATION

Dixie Snow Huefner

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Introduction

This chapter appears for the second consecutive year. It summarizes major education legislation in the United States Congress and highlights some of the more important state legislative enactments for the year 1993.

Federal Enactments

Education statutes during the first session of the 103rd Congress were even more limited than those of the previous year. Much of the legislation introduced in 1993 was carried over for action during the 1994 session, including action on President Clinton's Goals 2000: Educate America Act, his work apprenticeship bill (School-to-Work Opportunities Act), and reauthorization of the Elementary and Secondary Education Act. Reauthorization of the discretionary programs under the Individuals with Disabilities Education Act is also under way.

The most comprehensive education legislation of 1993 was the National and Community Service Trust Act. Also of interest were the Student Loan Reform Act of 1993, the Fiscal Year (FY) 1994 Appropriations Act for public and higher education, and an amendment to the National Assessment of Educational Progress legislation. Highlights of each follow.

National and Community Service Trust Act of 1993

The National and Community Service Trust Act of 1993[1] represents a scaled-back version of President Clinton's proposal to provide postsecondary education subsidies to young people in return for community service.

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[1] *See* Pub. L. No. 103-82; 107 Stat. 785 (1993).

To administer grants for national and community service programs, the Act establishes a Corporation for National and Community Service. The Corporation, created by combining the existing Commission on National and Community Service and ACTION, will also administer programs authorized under the existing Domestic Volunteer Service Act, including VISTA, Serve-America (a service-learning program for secondary school students) and the older Americans volunteer programs. The Corporation has the responsibility to establish qualification criteria and priorities for the new college-aid-for-service program, which will be called Ameri-Corps.

The Act also requires each state to establish its own commission on National Service. Each state commission will include fifteen to twenty-five citizens appointed by the governor on a nonpartisan basis. The commissions will determine (but not operate) state and local programs of community service, both public and private, in which participants will be placed. The commissions will then submit applications to the national Corporation for funding.

Funds will be distributed according to the following formula: (1) one-third to the states based on population, (2) a minimum of one-third based on competitive application by the states, and (3) the remainder to participating federal agencies and national nonprofit organizations. All community service participants must receive national education awards.

Program grant recipients will select individual participants based on the requirements of the job and without regard for their political affiliation. Participants generally must be seventeen years of age or older and either be high school graduates or agree to achieve general equivalency diplomas.

States and other program grant recipients will pay 25% of the cost of carrying out the program in cash or in kind, and the federal government will pay 75%. Administrative costs are limited to 5% of the amount of assistance provided by the federal government.

National service programs eligible for assistance can be either full-time or part-time programs, including summer programs, and must address "unmet human, educational, environmental, or public safety needs." Examples of national service programs include campus-based service-learning programs, youth corps programs for out-of-school and other disadvantaged youths, an intergenerational program to provide needed community services, programs to serve low-income areas or rural communities, programs seeking to eliminate hunger, and a professional corps program placing participants such as teachers, nurses, police officers, engineers, early childhood development staff, etc.

Generally speaking, full-time community service participants are to receive a living allowance equal to or greater than the average annual subsistence allowance given to VISTA volunteers (approximately $7,400 a year). Typically, the federal government will pay 85% of this amount. In addition, the federal government will provide 85% of the cost of health care premiums for full-time participants if they are not otherwise covered. It will also pay child-care benefits to those who need them.

In return for participation in eligible community service programs, participants will receive national education awards of $4,725 for one term of service (1,700 hours during a period from nine months to a year). Recipients may perform community service before, during, or after their postsecondary education. An award for a second term of service is available to those who complete a first term of service satisfactorily. Within seven years of completion of the applicable term of service, award recipients must use their awards for postsecondary education costs, which can include repayment of student-loan debts.

To earn an education award, a participant could elect to provide one year of full-time service or two to three years of part-time service (900 hours over two years—or over three years if the participant is enrolled in an institute of higher education while performing the service). Any corporation-authorized reduction in the hours of part-time service would produce a corresponding reduction in the amount of the educational award.

The Act is authorized for three years only, with spending caps as follows: $300 million for FY 1994, $500 million for FY 1995, and $700 million in FY 1996. These amounts are expected to provide enough funds for about 100,000 service participants. In the initial phase, 20,000 participants are expected to be recruited.[2]

Student Loan Reform Act of 1993/ Federal Direct Student Loan Program

Readers of last year's *Yearbook* chapter on state and federal legislation may recall that the most controversial provision in the Higher Education Amendments of 1992 was one establishing a model demonstration program of direct student loans from the federal government. Banks and other commercial and state lending agencies objected to the elimination of their role as intermediaries in various student loan programs. On the other hand, the General Accounting Office estimated the savings of a direct loan program to students at about $4.5 billion over five years.

During the 1993 budget reconciliation process, congressional education committees were required to save nearly that amount of money, and

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[2] M. Pitsch, *President Pursues National Service on Three Fronts*, XIII Educ. Wk. 15, Dec. 15, 1993, at 19. *See also* J. Zuckman, *Senate Clears National Service Despite GOP Objections*, Cong. Q., Sept. 11, 1993, at 2397.

Democrats looked to the direct student loan program.[3] The House and Senate, in conference, struck an agreement to expand the federal direct loan program but not to entirely eliminate the Family Federal Education Loan program (FFEL program, formerly the Stafford Loan program) with its intermediary agencies. The conference version of the so-called Student Loan Reform Act of 1993 was signed by President Clinton as part of the Omnibus Budget Reconciliation Act of 1993.[4]

Growth in the new direct loan program will be staged: for 1994-95, direct loans will constitute 5% of the new federal student loan volume, by 1995-96 40% of the new loans will be direct loans, and by 1998-99 60% will be direct loans. For the first two years of the program, the direct loan percentages are caps, and schools must apply to participate. By 1996-97, however, the percentages will represent minimums, and any higher education institution may participate in the direct loan program. Under the new legislation, graduates can choose to repay their loans on a twenty-year basis instead of ten and may make repayments contingent on their income.

Because, at least for now, the direct loan program is only partially replacing the FFEL program, part of the needed savings of $4.3 billion over the next five years is to be realized by FFEL program modifications (e.g., by reducing the origination fees paid by borrowers to lenders and the insurance fees paid to guarantors; capping interest rates at 8.25%, down from 9%; imposing new fees on lenders, the Student Loan Marketing Association, and holders of consolidated loans; reducing payments to lenders holding defaulted loans; and reducing interest subsidies paid while borrowers are in school).

Fiscal Year 1994 Education Appropriations Act

Following are the FY 1994 appropriations enacted for federal elementary, secondary, and postsecondary education programs,[5] compared to the FY 1993 appropriations for the programs.[6]

Fiscal Year 1994 Education Department appropriations total $30,976,574 or about $300 million fewer than in FY 1993. The above figure, however, includes $1.6 billion in FFEL liquidations, which frequently are not counted in the reported totals. Actual program spending is under $29 billion and is up slightly from FY 1993. As can be calculated from the figures below, small increases in the public education sector went to special education, bilingual and immigrant education, rehabilitation services, Chapter 1 programs, and impact aid, while decreases primarily affected Chapter 2 and drug-free-school programs.

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[3] *Special Report (Issue: Direct student loans)*, CONG. Q., Dec. 11, 1993, at 3394-95.

[4] Pub. L. No. 103-66, 107 Stat. 312 (1993).

[5] Pub. L. No. 103-112, 107 Stat. 1082 (1993).

[6] *Congressional Action on the Fiscal Year 1994 Budget*, DEP'T OF EDUC., October 20, 1993. *See also Final Education Dep't Budget for Fiscal 1994*, XIII EDUC. WK. 14, Dec. 8, 1993, at 14-15. Among other things, the EDUC. WK. summary does not reflect increased appropriations for program administration under the Student Loan Reform Act of 1993.

Of the 1994 total appropriations, approximately $6.5 billion are for mandatory programs (i.e., rehabilitation services, federal family education loans, and permanent vocational educational appropriations). The remaining $24+ billion are for discretionary programs.

FY 1994 EDUCATION APPROPRIATIONS BUDGET

	FY 1993 Appropriation	FY 1994 Final
EDUCATION REFORM		
Goals 2000: Educate America Act		$105,000,000
School-to-work Initiative		50,000,000
TOTAL, EDUCATION REFORM		$150,000,000
Office of Elementary and Secondary Education		
COMPENSATORY EDUCATION FOR THE DISADVANTAGED		
1. Grants for the disadvantaged (Chapter 1)		
Grants to Local Education Agencies:		
Basic grants	$ 5,449,925,000	5,642,000,000
Concentration grants	675,998,000	694,000,000
Capit. exp., priv. sch. children	39,734,000	41,434,000
Even Start	89,123,000	91,373,000
State agency programs:		
Migrant	302,773,000	305,193,000
Neglected and delinquent	35,407,000	35,407,000
State administration	60,712,000	60,712,000
State program improvement	25,933,000	25,933,000
2. Eval. & tech. assistance	14,036,000	13,100,000
3. Rural tech. assistance ctrs.	4,960,000	4,960,000
Subtotal, Chapter 1	6,698,601,000	6,914,112,000
4. Migrant education		
High school equivalency program	8,161,000	8,161,000
College assistance program	2,224,000	2,224,000
Subtotal, migrant education	10,385,000	10,385,000
TOTAL, COMPENSATORY EDUCATION	6,708,986,000	6,924,497,000

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7. If Goals 2000 legislation is not enacted by April 1, 1994, the $105 million will go to reduce the Pell Grant shortfall. The $50 million for the school-to-work initiative is matched by an equivalent amount in Labor Department appropriations.

	FY 1993 Appropriation	FY 1994 Final
IMPACT AID		
1. Maintenance and operations		
Payments for "a" children	567,080,000	613,445,000
Payments for "b" children	123,629,000	123,129,000
Payments for federal property	16,293,000	16,293,000
Payments for 3(d)(2)(B)	29,462,000	33,437,000
Payments re decreased activity	1,786,000	—
Subtotal, M & O	738,250,000	786,304,000
2. Disaster Assistance	90,000,000	—
3. Construction	11,904,000	11,904,000
TOTAL, IMPACT AID	820,154,000	798,208,000
SCHOOL IMPROVEMENT PROGRAMS		
1. Educational Improvement (Chapter 2)		
State and local programs	435,488,000	369,500,000
Inexpensive book distr.	10,029,000	10,300,000
Arts in education	6,944,000	8,944,000
Law-related education	5,952,000	5,952,000
Subtotal, Chapter 2	458,413,000	394,696,000
2. Drug-Free Schools and Communities		
State grants	498,565,000	369,500,000
School personnel training	13,614,000	13,614,000
National programs	61,496,000	59,496,000
Emergency grants	24,552,000	24,552,000
Safe Schools Initiative	—	20,000,000
Subtotal, drug-free schools	598,227,000	487,162,000

	FY 1993 Appropriation	FY 1994 Final
3. **Math & Science Ed. grants**	246,016,000	250,998,000
4. **Christa McAuliffe fellowships**	1,964,000	1,964,000
5. **Magnet schools**	107,985,000	107,985,000
4. **Ed. for homeless children**	24,800,000	25,470,000
5. **Women's educational equity**	1,984,000	1,984,000
6. **Training/advis. services**	21,606,000	21,606,000
7. **Dropout prevention demon.**	37,530,000	37,730,000
8. **Ass't to Virgin Islands**	2,455,000	1,227,000
9. **Ellender Fellowships**	4,223,000	4,223,000
10. **Follow Through**	8,478,000	8,478,000
11. **Native Hawaiian Ed.**	6,448,000	8,224,000
12. **Foreign Languages Ass't**	10,912,000	10,912,000
13. **Training, Early Child. Ed. & Violence Counseling**	4,960,000	14,000,000
TOTAL, SCHOOL IMPROVEMENT	1,536,001,000	1,376,659,000
INDIAN EDUCATION		
TOTAL	80,583,000	83,500,000
Office of Bilingual Education & Minority Languages Affairs		
BILINGUAL AND IMMIGRANT EDUCATION		
1. **Bilingual education**		
Bilingual programs	149,696,000	152,728,000
Support services	10,879,000	12,004,000
Training grants	35,708,000	36,431,000
2. **Immigrant education**	29,462,000	38,992,000
TOTAL, BILINGUAL & IMMIGRANT EDUC.	225,745,000	240,155,000

	FY 1993 Appropriation	FY 1994 Final
Office of Special Education & Rehabilitative Services		
SPECIAL EDUCATION		
1. State grants		
Grants to states, Part B	2,052,728,000	2,149,686,000
Chapter 1 handicap grants	126,394,000	116,878,000
Preschool grants	325,773,000	339,257,000
Grants for infants, families	213,280,000	253,152,000
Subtotal, state grants	2,718,175,000	2,858,973,000
2. Special purpose funds		
Deaf-blindness	12,832,000	12,832,000
Severe emotional disturbance	4,147,000	4,147,000
Severe disabilities	9,330,000	9,330,000
Early childhood education	25,167,000	25,167,000
Secondary/transitional services	21,966,000	21,966,000
Postsecondary education	8,839,000	8,839,000
Innovation and development	20,635,000	20,635,000
Media and captioning service	17,892,000	18,642,000
Technology applications	10,862,000	10,862,000
Special studies	3,855,000	3,855,000
Personnel development	90,122,000	91,339,000
Parent training	12,400,000	12,735,000
Info Clearinghouses	2,162,000	2,162,000
Regional resource centers	7,218,000	7,218,000
Subtotal, special purpose	247,427,000	249,729,000
TOTAL, SPECIAL EDUCATION	2,965,602,000	3,108,702,000

	FY 1993 Appropriation	FY 1994 Final
REHABILITATION SERVICES & DISABILITY RESEARCH		
1. State Grants	1,921,248,000	2,018,228,000
2. Special Purpose Funds	261,451,000	278,708,000
TOTAL, REHAB. SERVICES	2,182,699,000	2,296,936,000
PAYMENTS TO SPECIAL INSTITUTIONS		
Amer. Printing House for the Blind	6,298,000	6,463,000
Nat'l Tech. Inst. for the Deaf	40,713,000	41,836,000
Gallaudet University	77,589,000	78,435,000
TOTAL, SPECIAL INSTITUTIONS	124,600,000	126,734,000
Office of Vocational and Adult Education		
VOCATIONAL AND ADULT EDUCATION		
1. Vocational education		
Basic grants	972,750,000	972,750,000
Community-based organizations	11,785,000	11,785,000
Consumer/homemaking education	34,720,000	34,720,000
Tech Prep	104,123,000	104,123,000
Tribally controlled postsec voc	2,946,000	2,946,000
State Councils	8,928,000	8,928,000
National programs	31,327,000	38,077,000
Bilingual vocational training	2,946,000	2,946,000
Permanent appropriation	7,148,000	7,148,000
Subtotal, voc educ.	1,176,673,000	1,183,423,000

	FY 1993 Appropriation	FY 1994 Final
2. Adult education		
State programs	254,624,000	254,624,000
National programs	8,837,000	8,837,000
Literacy training for homeless adults	9,584,000	9,584,000
Workplace literacy partnerships	18,906,000	18,906,000
State literacy resource centers	7,857,000	7,857,000
Literacy program for prisoners	4,910,000	5,100,000
Subtotal, adult education	304,718,000	304,908,000
TOTAL, VOCATIONAL AND ADULT EDUC.	1,481,391,000	1,488,331,000
Office of Postsecondary Education		
STUDENT FINANCIAL ASSISTANCE		
1. Pell Grants (including shortfall)	6,461,970,000	6,556,731,000
2. Campus-based grants		
Supp. Educ. Op. Grants	583,407,000	583,407,000
Work-Study Grants	616,508,000	616,508,000
3. Federal Perkins Loans		
Federal capital contrib.	165,780,000	158,000,000
Loan cancellations	14,880,000	15,000,000
4. St. Stud. Incentive Grants	72,429,000	72,429,000
5. St. postsec. review program	5,300,000	21,250,000
TOTAL	7,920,274,000	8,023,325,000

	FY 1993 Appropriation	**FY 1994 Final**
FEDERAL FAMILY EDUCATION LOAN (Liquidating)		
TOTAL	2,873,937,000	1,617,099,000
FEDERAL FAMILY EDUCATION LOAN PROGRAM		
TOTAL	2,758,911,000	2,529,020,000
FEDERAL DIRECT LOAN DEMONSTRATION PROGRAM		
1. New loan subsidies		29,793,000
2. Fed. Administration	10,000,000	260,000,00
TOTAL	10,000,000	289,793,000[8]
HIGHER EDUCATION		
1. Aid for Institutional Dev.[9]	203,332,000	212,870,000
2. Program Development[10]	122,641,000	129,581,000
3. Interest subsidy grants	18,689,000	18,029,000
4. Special grants		
Assistance to Guam	397,000	397,000
Taft Inst. of Gov't, NYC	319,000	
5. Aid to Students		
Federal TRIO programs	388,048,000	418,525,000
Scholarships	30,826,000	42,329,000
Graduate fellowships	61,628,000	65,128,000
School, college, and univ. partnerships	3,928,000	3,928,000

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[8] This total reflects enactment of the Student Loan Reform Act of 1993.

[9] This category includes aid to historically black colleges and universities.

[10] This category includes funding for such programs as international education, cooperative education, minority science recruitment, improvement of postsecondary education, law school clinical experience, and urban community service.

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	FY 1993 Appropriation	FY 1994 Final
Legal training for disad.	2,991,000	2,991,000
TOTAL, HIGHER EDUC.	832,799,000	893,688,000
HOWARD UNIVERSITY		
TOTAL	194,005,000	192,686,000
COLLEGE HOUSING AND ACADEMIC FACILITIES LOANS (Liquidating)		
TOTAL	3,523,000	5,885,000
COLLEGE HOUSING AND ACADEMIC FACILITIES LOANS PROGRAM		
TOTAL	3,700,000	730,000
HISTORICALLY BLACK COLLEGE AND UNIVERSITY CAPITAL FINANCING PROGRAM		
TOTAL		200,000
Office of Educational Research and Improvement		
EDUC. RESEARCH, STATISTICS, AND ASSESSMENT		
1. Research and Statistics		
Educ. Research	73,984,000	78,000,000
Statistics	48,588,000	48,588,000
Nat'l Assess. of Educ. Progress	29,262,000	29,262,000
Subtotal, Research & Stat.	151,834,000	155,850,000

	FY 1993 Appropriation	FY 1994 Final
2. Fund for Innovation in Educ.	28,008,000	36,963,000
3. Fund for Improvem. and Reform of Schools & Teaching	9,083,000	9,083,000
4. Eisenhower Math/Sci. Education		
Nat'l Programs	15,872,000	16,072,000
Regional Consortia	13,590,000	13,871,000
5. Nat'l Diffusion Network	14,582,000	14,582,000
6. Blue Ribbon Schools	879,000	879,000
7. Javitz Gifted/Talented	9,607,000	9,607,000
8. Star Schools	22,777,000	25,944,000
9. Educ. Partnerships	4,136,000	
10. Territorial Tea. Training	1,737,000	1,737,000
11. Nat'l Writing Project	3,212,000	3,212,000
12. Nat'l Bd./Prof. Tea. Stds.	4,792,000	4,792,000
TOTAL	280,109,000	292,592,000
LIBRARIES		
TOTAL	146,069,000	146,309,000
Departmental Management		
PROGRAM ADMINISTRATION	304,899,000	352,008,000
OFFICE FOR CIVIL RIGHTS	56,402,000	56,570,000
OFFICE OF THE INSPECTOR GEN'L	29,262,000	28,840,000
TOTAL	390,563,000	437,418,000
TOTAL, DEP'T OF EDUCATION	$31,286,752,000	$30,976,574,000

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11. Final figures reflect subtraction of receipts of some $182,786,000 in FY 1993 and of expected receipts of $50,900,000 in FY 1994.

National Assessment of Educational Progress Amendment (NAEP)

An amendment expanding NAEP assessments for FY 1994 is worth a brief mention. Although quite widely accepted now, the National Assessment officially continues to be performed on a trial basis to allow state-by-state comparisons of student achievement and to determine whether such assessments yield valid and reliable and representative state data. The 1993 NAEP amendment to the General Education Provisions Act[12] provides that during FY 1994 the NAEP, overseen by the Center for Educational Statistics, again will conduct a trial math assessment for the 4th and 8th grades and a trial reading assessment for the 4th grade in states that wish to participate. In addition, the amendment provides that the National Assessment shall develop and administer a 12th grade math assessment and 8th and 12th grade reading assessments in states that wish to participate. More than forty states have indicated a willingness to be part of the 1994 trial assessments.[13] The FY 1994 budget appropriations for NAEP, however, fell far short of the requested amount and provided only the same amount of funds as was provided during the prior year. Therefore, how much or whether the program can or will be expanded as intended is doubtful.[14]

The Clinton Administration is proposing a controversial amendment to allow NAEP results to be reported for the school district and school building level rather than just the state level as a whole. Action on that recommendation is expected in 1994.

Federal Regulations

Among the key Department of Education regulations issued during 1993 that affect public and higher education are the following:

Final Rule, Head Start Program (governing children with disabilities in the Head Start Program).[15] Basically, this rule aligns the Head Start regulations with the preschool programming requirements of Part B of the Individuals with Disabilities Education Act and sets screening, evaluation, and programming standards that heretofore have been missing.

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[12] Pub. Law No. 103-33, 107 Stat. 93 (1993).

[13] D. Viadero, *Make State-Level NAEP Yearly, Panel Urges*, XIII EDUC. WK. 16, Jan. 12, 1994, at 14.

[14] D. Viadero, *E.D., NAEP Board Spar Over Plan to Limit Tests*, XIII EDUC. WK. 11, Nov. 17, 1993, at 15.

[15] 58 Fed. Reg. 54492 (1993) (to be codified at 45 CFR Parts 1304, 1305, and 1308).

Final Regulations, Chapter I Program in Local Education Agencies.[16] These regulations provide more flexibility in the fiscal requirements for school-wide projects.

Final Regulations, Early Intervention Program for Infants and Toddlers with Disabilities, Part H of the Individuals with Disabilities Education Act.[17]

Final Regulations, General Educational Provisions Act (GEPA); Enforcement.[18] These regulations detail procedures for grant recipients appealing to the Office of Administrative Law Judges and the Secretary of Education.

Final Regulations, Federal Direct Student Loan Demonstration Program.[19] On January 4, 1994, these regulations were supplemented by final standards, criteria, and procedures for the new Federal Direct Student Loan Program,[20] but the updated regulations refer back to the earlier regulations as an important source of information for participants.

Notice, Federal Direct Student Loan Program, Standards for Selection of Participants.[21]

State Legislation

This section samples 1993 legislation across the fifty states. As was true in last year's sample, this year's sample does not pretend to be either exhaustive or comprehensive and does not cover higher education legislation. The following synopses, however, do indicate the nature of many of the significant public education measures enacted during 1993. The legislation is grouped thematically. Since last year, three categories have been added to the list: desegregation, privatization, and sexual harassment/sexual orientation discrimination.

Accountability & Outcome-based Education

Outcome(s)-based education (OBE) is part of the effort to achieve better accountability and higher standards in education. Outcome-based education refers to measures of student productivity and achievement that are to be achieved prior to graduation, as contrasted with input-based education, which focuses on such inputs as teacher certification standards, teacher-pupil ratios, and number of credit hours required for graduation. Among the state legislatures mentioned in the 1993 *Yearbook*, initiating OBE reforms in 1992 were those of Kansas, Nebraska, Minnesota, and Washington.

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[16] 58 Fed. Reg. 11920 (1993) (to be codified at 34 CFR Part 200).

[17] 58 Fed. Reg. 40958 (1993) (to be codified at 34 CFR Part 303).

[18] 58 Fed. Reg. 43472 (1993) (to be codified at 34 CFR Part 81). *See also* Final Regulations, Correction to GEPA Enforcement, 58 Fed. Reg. 51013 (1993).

[19] 58 Fed. Reg. 36088 (1993) (to be codified at 34 CFR Part 685).

[20] 59 Fed. Reg. 472 (1994) (to be codified at 34 CFR Part 685).

[21] 58 Fed. Reg. 47816 (1993).

Over the past year, OBE increasingly has become snarled in controversy because in some people's minds it is linked with nontraditional assessment procedures and values-based education. While 1993 saw continuing legislation emphasizing results-oriented accountability standards, the legislation reflected increased caution in defining OBE.

The **Colorado** legislature enacted a "standards-based" reform measure, establishing a nine member state council to develop statewide instructional-content standards and a statewide assessment system. The state board is to adopt content standards by January 1995. Instruction and assessment measures are to be aligned with the standards, and the state board is to adopt an assessment system for 4th, 8th, and 10th grade students by January 1996. The legislature specified that the state board need not adopt "outcome-based" methods of instruction, nor portfolios in place of other assessment measures. The statute establishes "a fundamental right to free public education," which includes opportunities to achieve content standards at a level allowing effective citizenship, productivity as a member of the labor force, and successful lifelong learning.[22]

Massachusetts, as part of a massive reform measure enacted after several years of legislative debate, established requirements for development, by 1995-96, of a statewide core curriculum and specific expected student outcomes. Three separate certificates of competency were established: a certificate of competency determination, a certificate of mastery, and a certificate of occupational proficiency. Included in the reform measure is a plan to eliminate the so-called general track of study by 1995 and extensive professional development requirements to train educators in the new curriculum and outcomes. A criterion-referenced assessment program is part of the package, including work samples and portfolio measures, where appropriate. In addition, comprehensive diagnostic assessment is to occur at the 4th, 8th, and 10th grade levels.[23]

At the end of 1993, the **Michigan** legislature enacted a broad package of school reform measures, linked to comprehensive school finance reform. It ordered the state board to submit rules for a core curriculum and grade-level academic performance standards by September 1994. Local school districts must implement the standards by 1997-98. An extensive assessment system, culminating in a state-endorsed diploma,

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22. 1993 Colo. HB 1313.
23. 1993 Mass. Adv. Leg. Serv. 71.

will accompany the performance standards. The legislation also provides for special assistance for regular education students who do not meet the reading standards at the 4th grade and 7th grade; the expectation is that the reading skills can be brought to grade level within twelve months. The performance standards must focus on cognitive and academic instruction, and the legislature banned instruction in value systems, attitudes, and beliefs "that are not essential in the legal, economic, and social structure of our society."[24]

One can detect legislative sensitivity to the controversy over outcome-based education that has plagued the Pennsylvania State Board of Education and the legislature over the past several years. By way of update to last year's chapter, the **Pennsylvania** State Board of Education acceded to legislative demands and made changes in its proposed outcomes-based education system, eliminating some of the arguably more value-laden outcomes such as "appreciating and understanding others."[25]

Missouri legislation requires the state board of education to come up with new academic performance standards and curriculum frameworks to guide local school districts. In addition, an "A+ schools program" will provide grant awards to schools committed to ensuring that all students graduate and enter a postsecondary school or obtain a high wage-paying job. Additional grants are available to upgrade vocational and technical education, as well as to reward districts achieving a reduced teacher-student ratio of twenty-five to one in grades K-3. The reform legislation also authorizes the state board of education to investigate "academically deficient" schools and to order recall elections for local school board members, among other things.[26]

North Carolina lawmakers established a twenty-five member Education Standards and Accountability Commission, charged with responsibility for formulating new exit standards for high school graduates. The commission will also set standards and assessment benchmarks for students in grades K-12 to identify how students at each grade level, including students with disabilities and special needs, should be progressing toward the new graduation requirements. The Commission's standards are to be implemented during the 1995-96 school year, and by the spring of 2000 all seniors are expected to achieve the new standards in order to receive a diploma.[27]

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24. 1993 Mich. HB 5121.
25. The earlier OBE regulations were nullified by a 1993 amendment to the special education appropriations bill. Although Pennsylvania regulations can take effect without legislative approval, the legislature can invalidate regulations if it so chooses.
26. 1993 Mo. SB 380.
27. 1993 N.C. Adv. Leg. Serv. 117; 1993 N.C. Adv. Leg. Serv. 321; 1993 N.C. Adv. Leg. Serv. 359.

South Carolina amended its 1991 Education Finance Act to require an "Innovation Initiative" to accelerate the state's movement toward performance-based outcomes. Each school district must submit a five-year strategic plan, which must include innovative strategies for educational improvement. The state can allocate funds to school districts for innovation in any of four areas: critical-thinking skills, site-based management, interagency collaboration, and performance-based outcomes. Schools districts and individual schools are required to disseminate an annual progress report to parents.[28]

The **Washington** state legislature, following up on 1992 legislation, adopted performance-based standards and statewide student learning goals for grades K-12. Responding to the OBE controversy erupting nationwide, the legislature explicitly stated that a performance-based system need not use an "outcome-based instructional model," and the legislators declined to include a goal asking students to demonstrate that they were responsible and caring individuals. The Washington State Commission on Student Learning was charged with developing the performance standards by 1995-96. In subsequent years, the Commission must develop a system of student assessments and school accountability programs. The assessment system is to include performance-based, criterion-referenced measures. The Commission also is to develop a system for intervening in those schools where students persistently fail to achieve the essential academic learning goals.

The performance standards anticipate that by the age of sixteen students would be eligible for a certificate of mastery, after which they may choose alternative educational pathways, each of which must "emphasize integration of academic and vocational education." Participation by school districts in the above reforms is voluntary until the year 2000, after which time it is mandatory. Districts applying for grants to implement the reforms must be funded for up to five teacher-planning days during the school year. Participating schools must deliver annual school performance reports to each parent in the school.[29]

The Washington reforms were funded at nearly $58 million, $23 million of which is for research and planning time during 1994-95.[30] At the same time the administrative staff budget was cut by $40 million, a 10% reduction per district.

Assessment of Students

Most states initiating OBE reforms are interested in multiple measures of student assessment rather than primary reliance on standard-

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28. 1993 S.C. Acts 135.
29. 1993 Wash. Adv. Leg. Serv. 336.
30. 1993 Wash. Adv. Leg. Serv. 24.

ized, norm-referenced achievement tests. In addition to criterion-referenced tests, many states are piloting such informal measures as work samples organized into student portfolios, open-ended and essay questions, teacher observations, and other applied performance measures. Among the states mentioned in last year's assessment section were Hawaii, Nebraska, Ohio, Oklahoma, and Tennessee.

In 1993 **Arkansas** authorized the state board of education to develop a comprehensive-competency and outcome-based-assessment program, along with revised curriculum frameworks.[31] Included in the assessment program are required teacher observations and classroom evaluations of reading and math performance in grades 1, 2, and 3, to be introduced during the 1993-94 school year. Performance assessments are to be based [illegible] Arkansas' Learning Outcomes and curriculum frameworks. By 19[illegible], students must complete an outcome-based assessment to graduate from high school, although students with disabilities need take the test only if it appropriately measures their abilities. They may receive a diploma without completing the assessment if they fulfill their Individualized Education Program (IEP) requirements. The outcome-based assessments are not to measure religious or political beliefs, ethics, attitudes, or values. Assessments of self-esteem, mental health, emotional health, or home or family life are not permitted for grading purposes or for graduation requirements.

In 1993 **Indiana** decided to delay until 1995-96 the implementation of its 1992 assessment legislation. Under the 1992 legislation, students were to be assessed in the 4th, 8th, and 10th grades. The 1993 amendments added grades 3 and 12, along with a requirement that the state board of education implement a performance-based award and incentive program to schools whose students improved on the assessment measures. The assessment focuses on achievement of "essential skills" performance standards and demonstration of problem-solving abilities.[32]

The **Kansas** governor vetoed a 1993 bill that would have established a second layer of statewide assessment on top of 1992's Quality Performance Accreditation (QPA) system. In response to critics of QPA, legislators decided to test students in grades 10, 11, and 12 in basic skills such as reading and mathematics. The governor, however, staunchly defended the ten QPA learning outcomes in vetoing the add-on requirements.[33] The Kansas legislature, however, passed a resolution that, while reconfirming its support of QPA, recommended that the Kansas State Board of Education rewrite the learning outcomes to clarify that they focus on academic achievement and are not intended to alter any individual religious or moral beliefs of students.[34]

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[31] 1993 Ark. Adv. Leg. Serv. 846.

[32] 1993 Ind. Adv. Leg. Serv. 38.

[33] P. West, *Kan. Governor Vetoes State System of Basic-Skills Testing*, XII EDUC. WK. 32, May 5, 1993, at 16.

As part of a larger reform package addressing accountability issues, **Missouri** ordered the state board of education to develop a flexible statewide assessment system that is not to include test versions approved pursuant to earlier law. Under the new system, comparisons are to be allowed only with the prior academic performance in the same school but not across schools. A school that meets exemplary assessment levels for three consecutive years can apply for a waiver of state rules and regulations.[35]

New Hampshire funded the development of a new statewide system of student assessment to be administered at elementary, middle/junior high, and secondary school grade levels. At a minimum the system must measure performance in reading and language arts, math and science, and history and geography. It is to utilize a variety of assessment tasks, including open-ended and essay measures, each of which must be scored objectively.[36] The system will replace a norm-referenced testing system.

The **Texas** legislature authorized the state board of education to create a primarily performance-based and criterion-referenced statewide assessment system. In addition, however, a norm-referenced, nationally recognized annual examination in mathematics and reading was authorized. The legislature announced a standard requiring graduates to meet exit-level requirements for reading, writing, and mathematics, although students with disabilities may receive exemptions. Summer study guides are to be made available to parents for use with their children.[37]

As noted in the section on outcome-based education, **Colorado**, **Massachusetts**, **North Carolina**, and **Washington** also adopted statewide assessment systems as part of their 1993 reform packages.

Charter Schools

In 1991 Minnesota became the first state in the country to enact legislation authorizing charter schools, which it called "Outcome-based Schools." Both public and private schools were eligible for the designation. In 1992 California became the second state, when it authorized the creation of 100 public charter schools. In general, so-called charter schools are meant to allow experimental, innovative practices free from state and local regulatory constraints; in return, the schools are accountable for results. Over the past year, at least seven other states have established charter school laws, and differences among the states have emerged (e.g., in the actual degree of freedom from regulations and collective bargaining agreements; the need, or lack thereof, for local board approval of the charter; the acceptability of new schools and private schools as charter schools; and the financing of start-up costs for new schools). Restrictions on the number of charter schools (i.e., the scale of the experiments) also vary.

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[34] 1993 Kan. Adv. Leg. Serv. 294.

[35] 1993 Mo. SB 380.

[36] 1993 N.H. Adv. Leg. Serv. 290.

[37] 1993 Tex. Adv. Leg. Serv. 347.

Colorado enacted a measure to create fifty charter schools operating as public schools within public school districts, yet free of most school district policies and state regulations. The legislation prohibits home-based and sectarian schools from participation in the program, and it provides for an application procedure to local school districts and an appeal to the state board if the application is not successful. Priority is to be given to schools that intend to increase the educational opportunities of at-risk students. The legislation expires after five years.[38]

In contrast, **Georgia** enacted a law allowing local public schools to apply directly to the state board of education for charter school designation. Each charter school essentially would be free of state regulation. In return, the schools must create methods and measures for evaluating their own performance, must strive to accomplish the six national educational goals, and must issue yearly reports to parents. Each school will receive a three-year, renewable term contract. Local school boards and parents are to be involved in the establishment of each school's mission and learning objectives, and two-thirds of the school's instructors and two-thirds of the parents present and voting at a specially called meeting must approve of its being a charter school. The number of such schools is unrestricted.[39]

In **Massachusetts**, the legislature passed a measure allowing the establishment of twenty-five public charter schools operating independent of the local school committee. Private and parochial schools are precluded from participating. The schools will have five-year charters. Ten or more parents, two or more teachers, or a corporate or business entity may apply to the state Secretary of Education for permission to form a charter school. Basically, enrollment must be open to all on a space available basis, although enrollment may be limited to specific grades or a special focus (such as math and science) and may be conditioned on reasonable academic achievement standards. No more than five charter schools may be established in either Boston or Springfield, and the first such schools may not open until the 1995 school year.[40]

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[38] 1993 Colo. SB 183.

[39] 1993 Ga. Adv. Leg. Serv. 551.

[40] 1993 Mass. Adv. Leg. Serv. 71.

The 1993 **Michigan** legislature approved creation of "public school academies" that would allow a public school district, a state university, or a community college to establish publicly-funded schools free of certain state restrictions. An academy created by a local school board, however, would be subject to the collective bargaining agreement, whereas an academy created by a university or community college would be able to use noncertificated faculty as teachers. Each academy would be authorized by the appropriate body (i.e., a school board, a community college board, or the governing board of a state university). The legislation was passed in late 1993 and signed by the governor early in 1994.[41]

During 1993, **Minnesota** expanded its number of authorized charter schools from eight to twenty. In the same legislation it also decided to pilot the creation of three "change oriented" schools within local school districts. Funded by competitive application, these schools, like charter schools, will be free from most state mandates. These redesignated schools are to utilize site-based management and to develop an interdisciplinary curriculum.[42]

New Mexico legislation authorized up to five public charter schools across the state, each with a five-year charter. Waivers will be granted with respect to such matters as class size, curriculum, and budget requirements. Application must be made through the local school board to the state board of education. Sixty-five percent of the teachers in a school must support its conversion to a charter school. Each school will receive $5,000 for start-up costs.[43]

Wisconsin enacted legislation authorizing the state school superintendent to approve the first ten local school board requests for charter schools, with no more than two such schools per district. Each school board must receive a petition from its teachers for the creation of a charter school; either 50% of the teachers in one school or 10% of the teachers in the district must sign the petition. The charter school must be within the school district but need not be an existing school. Existing private schools, however, may not convert to a charter school. School boards are to give priority to those charter schools that serve children at risk. The teachers will remain school board employees and subject to collective bargaining agreements.[44]

Class-size Reduction

Last year's *Yearbook* chapter noted Alaska's class-size-reduction pilot program. In 1993 the **Minnesota** legislature funded a measure to reduce the ratio of K-6 students to teachers to seventeen to one, and called for an individualized learning plan for each student. Staged implementation begins with kindergarten.[45]

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[41] 1993 Mich. SB 896.

[42] 1993 Minn. Adv. Leg. Serv. 224

[43] 1993 N.M. Adv. Leg. Serv. 227.

[44] 1993 Wis. Adv. Leg. Serv. 16.

New Mexico passed a law establishing a maximum average class size of twenty students per kindergarten teacher, twenty-two students per teacher for grades 1-3, twenty-four students per teacher for grades 4-6, and 160 students per teacher for grades 7-12, with certain exceptions. Deadline for implementation is the 1994-95 school year.[46]

Corporal Punishment

Corporal punishment bans adopted by the 1992 Michigan and Utah legislatures were reported in last year's chapter. In 1993 **Maryland** lifted the exemption for certain counties from the legislative prohibition of corporal punishment in the schools; the ban is now statewide.[47] **Nevada** enacted a ban on corporal punishment in the schools except in limited circumstances, such as self defense, defense of others, or quelling a disturbance.[48] Finally, the **Washington** State legislature also prohibited corporal punishment in the public schools. The law is to be implemented by September 1, 1994.[49] Nearly half the states now ban corporal punishment in their schools.[50]

Crime Prevention/Violence Prevention

Minnesota's 1992 legislation was singled out in last year's *Yearbook*. This year safe schools legislation burgeoned across the states.

California tightened its discipline code. The legislature removed the discretion given to administrators and imposed mandatory suspension and recommended expulsion for any student bringing an explosive, firearm, or knife to school without "reasonable cause."[51]

Colorado passed legislation explicitly creating a right to a safe school environment and strengthening the existing discipline requirements. Each school district must adopt a conduct and discipline code that includes a policy on control of gang activities as well as remedial discipline plans. An annual written discipline report to the superintendent and board of education must also be made available to parents. Expulsion is mandated for habitually disruptive students. One interesting feature is the requirement that, as an alternative to suspension, parents must be given the option to remain in school with their misbehaving children.[52]

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[45] 1993 Minn. Adv. Leg. Serv. 224.

[46] 1993 N.M. Adv. Leg. Serv. 228.

[47] 1993 Md. Adv. Leg. Serv. 207.

[48] 1993 Nev. Adv. Leg. Serv. 625.

[49] 1993 Wash. Adv. Leg. Serv. 68.

[50] *See News in Brief*, XII EDUC. WK. 30, April 21, 1993, at 21. The Education Week tally appeared before Nevada enacted its prohibition.

[51] 1993 Cal. Adv. Leg. Serv. 1255 (Deering).

Colorado also banned handgun possession by a person under age eighteen. Parents who do not make reasonable efforts to prevent a weapons violation by their child can be convicted of a felony.[53] A separate statute stiffened the penalties for carrying, bringing, using, or possessing a deadly weapon on school grounds.[54] One section of the law, challenged in court, presumes that a juvenile arrested on a weapons violation, including carrying a concealed weapon on school grounds, is a danger to the community and can be held for forty-eight hours pending a detention hearing rather than being released on bond.[55]

Florida prohibited the possession of firearms by persons under the age of eighteen. Penalties now include, in addition to possible fines and jail sentences, the public release of violators' names, mandatory driver license suspension or revocation, and mandatory community service hours. Parents who knowingly and willfully allow their minor children to possess a firearm are guilty of a felony, as are those who sell or transfer a firearm to a minor.[56]

Massachusetts, as a part of its comprehensive reform measure, established statewide standards for student discipline, including suspension and expulsion, and requirements for the content of student handbooks. One provision requires the reporting of all weapons violations to the superintendent, who must then report them to the police department, school board, and Department of Social Services.[57] A second statute allows suspension of any student charged with a felony and expulsion for any student convicted of a felony.[58]

In **North Carolina** a student who has a firearm on school property commits a felony, and parents or anyone living with a minor commit a misdemeanor if the minor gains access to the firearm at home and uses it unlawfully.[59] In addition, separate statutes establish uniform reporting requirements calling for (1) local school boards to report incidents of school violence to the state board, and (2) principals to report to the local law enforcement agency.[60] Finally, North Carolina appropriated $2.5 million for 1993-94 and the same amount for 1994-95 for grant programs to school districts that, singly or in combination, create innovative programs to make schools safe for students and employees. Both school violence and sexual harassment are to be addressed by the grants.[61]

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[52] 1993 Colo. HB 1093.

[53] 1993 Colo. HB 1001.

[54] 1993 Colo. SB 38.

[55] *See States*, XIII EDUC., WK. 9, Nov. 3, 1993, at 2.

[56] 1993 Fla. Adv. Leg. Serv. 416.

[57] 1993 Mass. Adv. Leg. Serv. 71.

[58] 1993 Mass. Adv. Leg. Serv. 380.

[59] 1993 N.C. Adv. Leg. Serv. 558.

[60] 1993 N.C. Adv. Leg. Serv. 327; 1993 N.C. Adv. Leg. Serv. 321.

The **Oregon** legislature passed a law changing the penalty from a misdemeanor to a felony for a person who intentionally carries a firearm loaded or unloaded or other dangerous weapon into a school or other public building.[62] The penalty is up to five years in jail and a fine of up to $100,000.[63]

Possession of handguns loaded or unloaded by persons under eighteen years of age is now illegal in **Utah**.[64] Violation is a misdemeanor, while possession of a sawed-off rifle or shotgun is a felony. Parents failing to make reasonable efforts to prevent their child from illegally possessing a weapon commit a misdemeanor. A separate statute requires that juvenile court convictions, detentions, and probations be reported to the offender's school.[65]

Virginia lawmakers enacted a measure suggesting that local schools create a confidential hotline, called a School "Crime Line" to encourage students to report unlawful acts.[66] In addition, courts must report to local school superintendents the court-ordered disposition for all students who are adjudicated delinquent for drug use, weapons violations, and other serious criminal offenses.[67] The legislature also established a pilot program awarding grants to school districts to develop and evaluate alternative schools for students suspended or expelled for weapons and drug violations and the like.[68]

Desegregation

Connecticut enacted a law to cluster public schools into eleven regions that must devise regional plans to improve racial balance in the public schools. Plans, which may include magnet schools, paired schools, charter schools, and school choice plans, are due in the office of the Education Commissioner by September 15, 1994. The state superintendent is authorized to grant waivers of state rules, as appropriate. As part of the plan each region would be expected to demonstrate how it would increase student diversity or awareness of diversity and how it would increase academic performance. If a region fails to submit a plan, funds can be withheld, but if a region fails to implement its plans, the legislation provides no penalty.[69]

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[61] 1993 N.C. Adv. Leg. Serv. 321.
[62] 1993 Or. Adv. Leg. Serv. 625.
[63] 1993 Or. Adv. Leg. Serv. 680.
[64] 1993 Utah Adv. Leg. Serv. 10.
[65] 1993 Utah Adv. Leg. Serv. 9.
[66] 1993 Va. Adv. Leg. Serv. 361.
[67] 1993 Va. Adv. Leg. Serv. 889.
[68] 1993 Va. Adv. Leg. Serv. 819.

Early Childhood Programs

Programs in California, Kentucky, and Tennessee were reported in last year's *Yearbook*. At least six other states enacted legislation on this topic in 1993.

Massachusetts, in its reform legislation, established a commission charged with developing a plan to provide developmentally appropriate preschool opportunities for all three and four year olds in the state. The opportunities are to be provided (1) at no cost to eligible children, and (2) on the basis of a sliding fee scale to children in more affluent families. In addition, the same Act calls for a demonstration project to assess parental outreach programs that help families work with their children from ages one to three. The project is to identify a model for universal implementation within the state by 1997.[70]

Missouri's education reform law included an early childhood development measure, providing funds to allow all eligible children and parents to participate in an education and screening program for children under the age of five.[71]

The **Rhode Island** legislature passed early childhood legislation that provides seed money and technical assistance to school districts that develop programs focusing on parenting skills and educational programs for disadvantaged preschoolers, including those excluded from Head Start. Efforts to facilitate the transition from pre-school to school programs is to be part of the program development.[72]

In **North Carolina** lawmakers established a nonprofit corporation, the North Carolina Partnership for Children, to develop and oversee a long-term strategic plan for early childhood education and development. The so-called "Smart Start" initiative is funded at $20 million for the first year and $27 million for the following year. Twelve competitive demonstration grants will be funded, one in each congressional district. The Partnership is to set goals, and counties are to establish private, nonprofit organizations to implement them. The idea is to form public-private partnerships, involving interagency and private collaboration, to offer early childhood education programs, home visiting and parenting programs, and child-care services and subsidies. The Secretary of the

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[69] 1993 Conn. Adv. Leg. Serv. 263.

[70] 1993 Mass. Adv. Leg. Serv. 71.

[71] 1993 Mo. SB 380.

[72] 1993 R.I. Adv. Leg. Serv. 329.

Department of Human Resources must approve each demonstration project, based on recommendations from the Partnership.[73]

South Carolina transferred $95 million to fund a comprehensive and flexible program of early childhood development and academic assistance achievement. The program is to focus on increased interagency collaboration and a developmentally appropriate curriculum for students from the age of three through grade three. Local school districts must submit implementation plans to the state office for approval. The state education office will promulgate regulations for an expanded parenting/family-literacy program for families with children from birth to five years of age. It also will develop regulations for a half-day program for four year old children at risk, which districts must offer to parents of eligible children within their boundaries.[74]

Washington State appropriated $8 million for grants to school districts to provide a continuum of care for young children in order to enable them to be "ready to learn." Collaboration with community service providers is required as a part of the grant application.[75]

Finances

Among states singled out for mention in last year's *Yearbook* were Colorado, Connecticut, Florida, Georgia, Iowa, Kansas, Maryland, Minnesota, Mississippi, Nebraska, Ohio, Tennessee, and Utah. In addition California, New Mexico, and Virginia voters approved major bonding for their schools in 1992.

In 1993 **Illinois** averted a major shutdown of the Chicago public schools by enacting a measure to eliminate the Chicago budget deficit. By law the Chicago schools must present a balanced budget, and a deficit of over $400 million threatened to close the schools for the 1994-95 school year.[76] Provisions reducing to $100 million the required reserve fund balances and authorizing a $427 million increase in bonding authority were coupled with a series of measures increasing the control of the independent Chicago School Finance Authority (e.g., to establish annual expenditure limits for district operations; to appoint an Inspector General to investigate fraud, waste, and financial mismanagement; to approve the staff plan and to set limits on hiring or appointments; and to initiate management audits). The legislature precluded employee eligibility for early retirement unless the employee agreement allowed unused sick days to be paid in installments over a five-year time period. It also authorized principals, with the permission of over half their employees, to waive certain portions of the collective bargaining agreement. Finally, the legislation authorized the Chicago School Board, or the City itself, if the Board defaults, to call for a special election to increase the tax rate for educational purposes.[77]

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[73] 1993 N.C. Adv. Leg. Serv. 321; 1993 N.C. Adv. Leg. Serv. 561.

[74] 1993 S.C. Acts 135.

[75] 1993 Wash. Adv. Leg. Serv. 24.

[76] *See* A. Bradley, *Officials in Chicago Warn of a Shutdown Over Budget Crisis*, XII Educ. Wk. 35, May 26, 1993, at 1, 14.

Indiana revised its school aid formula to help equalize funding between rich and poor districts but declined to fund it via a tax on hospital revenues or a cigarette-tax increase. The change will be phased in over six years.[78] A major budget deficit was expected to crimp the effect of the funding change.[79]

In mid-1993 the **Massachusetts** legislature passed a comprehensive school reform bill that included a revised foundation formula to reduce funding inequities across school districts. The foundation budget targeted spending approximately $5,500 per pupil by 2000.[80] A week later the Massachusetts high court struck down the old finance formula for failing to close the gap between rich and poor districts.[81]

In July 1993 the **Michigan** legislature voted to repeal the property-tax-based school funding system, with the concomitant loss of $5-6 billion in school revenues.[82] It did so in spite of the fact that the month before Michigan voters had rejected a proposed constitutional amendment to reduce reliance on the property tax and increase the sales tax in order to reduce inequities between rich and poor school districts across the state.[83] Just before the end of the year, the legislature finally decided how to replace the lost funding. It opted for a 1994 referendum asking voters to fund public education via a broadened tax package including an increase in the state sales tax from 4% to 6%, combined with a six mill property tax on homes, a slight decrease in personal income taxes, and a fifty cent per package tax increase on cigarettes. If voters reject this option, an automatic fall-back plan takes effect that raises the income tax rate from 4.6% to 6%, levies a twelve mill property tax on homes, increases the state business tax, and increases the cigarette tax by fifteen cents per

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77. 1993 Ill. Adv. Leg. Serv. 511.
78. 1993 Ind. HEA 100(ss).
79. D. Cohen, *Ind. Lawmakers Override Bayh's Budget Veto Despite Warnings on Inadequate School Funds*, XII Educ. Wk. 39 Extra Edition, July 14, 1993, at 20.
80. 1993 Mass. Adv. Leg. Serv. 71.
81. K. Diegmueller, *Mass. Court Rules Finance System Is Unconstitutional*, XII Educ. Wk. 39, June 23, 1993, at 1, 30.
82. L. Harp, *Mich. Law Bans Property Tax Use to Fund Schools*, XII Educ. Wk. 40, Aug. 4, 1993, at 1, 35.
83. L. Harp, *Mich. Voters Reject Amendment to Retool Tax System*, XII Educ. Wk. 37, June 9, 1993, at 21.

package. Either option will provide for an increase in school aid per pupil to an average of $5,000 within five years.[84]

The **Minnesota** legislature passed a measure to end, by 1997, the use of local tax referendums to supplement local district funding. The measure is part of a continuing effort to reduce funding disparities across school districts. A more equitable finance scheme is to be in place by 1998.[85]

Missouri revised its state funding formula to direct more state aid to poorer districts in response to a court decision declaring the prior formula unconstitutional. The result will be to raise $86 million in new revenues,[86] largely through significant increases in the income tax rate, corporate tax rate, and the cigarette tax, and through reduction of the federal income tax deduction on state tax returns. The same legislation provides that no state aid will be available unless a school district sets an operating levy at $2.75 per $100 of assessed property value.[87]

Montana lawmakers enacted a new foundation formula that favors low revenue school districts.[88] It also undercalculated the amount of state aid owed to local school districts under the formula. An earlier defeat by voters of a proposed expansion of the state sales tax and a successful petition drive by taxpayers to block a legislatively enacted income tax increase added to the pressure to cut school spending.[89] At the end of 1993, the legislature was forced to cut state aid by 4.5%, and it ordered school districts to cut their budgets by the same amount.[90]

New Jersey repealed a section of the controversial Quality Education Act that had required local school districts to pay for the employer's contribution to the teacher pension fund. In its place, the state agreed to pay the contribution.[91] Later in the year a state court judge declared the 1991 version of the Quality Education Act unconstitutional.[92] A bipartisan commission is attempting to develop a long-term school finance formula that can pass constitutional muster.[93] Meanwhile, the 1993 legislature approved a $250 million low-interest loan pool for school construction and renovation; under the legislation, money borrowed and repaid by districts will become available to be loaned to other districts.[94]

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[84] *See* 1993 Mich. HB 4279. The finance reform law was contingent upon enactment of a series of other school finance bills, all of which have become law, and upon submission to the voters of the ballot measure in Senate Joint Resolution S. The ballot measure was scheduled for a vote on March 15, 1994.

[85] 1993 Minn. Adv. Leg. Serv. 224.

[86] *Legislative Update*, XIII EDUC. WK. 4, Sept. 29, 1993, at 19.

[87] 1993 Mo. SB 380.

[88] 1993 Mont. Adv. Leg. Serv. 633.

[89] *See* P. West, *Tax Defeat in Montana Clouds Funding Outlook for Schools*, XII EDUC. WK. 38, June 16, 1993, at 18; P. West, *Mont. Lawmakers Work to Close Budget Shortfall*, XIII EDUC. WK. 15, Dec. 15, 1993, at 15.

[90] 1993 Mont. Adv. Leg. Serv. 38.

[91] 1993 N.J. Adv. Leg. Serv. 57.

[92] K. Diegmueller, *N.J. Judge Declares Finance System Unconstitutional*, XIII EDUC. WK. 1, Sept. 8, 1993, at 30.

[93] K. Diegmueller, *N.J. Coalition Advocates Less Reliance on Prop. Taxes for School Funding*, XIII EDUC. WK. 6, Oct. 13, 1993, at 16.

New York revised its school funding formula and, for the first time in several years, increased funds for its schools by some $330 million. The effect of the change will be to increase the availability of state aid to poorer school districts, including New York City. Limited English proficiency, poverty (measured by school lunch eligibility), and rural sparsity are all factors determining eligibility for "extraordinary needs" aid.[95]

The **Oklahoma** legislature passed a resolution that will give voters the opportunity to decide if they want to continue to have an annual say in property tax levies. Now, voters are asked each year to approve twenty of the forty-four mills of property tax dedicated to school matters (i.e., that portion of the tax constituting the emergency levy, the local support levy, and the building fund levy). The remainder of the levy is assessed without voter approval. Under a proposed amendment to the constitution, these assessments would be made permanent until repealed by the voters.[96]

In 1993 **Oregon** voters defeated a 5% sales tax initiative earmarked for education. A property-tax limitation measure approved by the voters in 1990 forced the state to reimburse school districts for lost property tax revenues over the past several years. In 1993 a $500 million shortfall in education funding resulted, which the state's voters were not willing to eliminate via a sales tax.[97]

Pennsylvania lawmakers enacted a FY 1994 budget that froze basic state aid to wealthier districts while pumping an additional $130 million into poor school districts.[98] The budget shifts are part of an ongoing effort to develop a more equitable funding formula. Also as part of this effort, the legislature mandated data collection on the relative importance of such factors as poverty, special education, and local and state revenue sources.[99]

During 1993 the **Tennessee** legislature enacted a permanent extension of the half-percent sales tax increase (from 5.5% to 6%) that was due to expire in June 1993.[100] Although earmarked for education, the extension does not begin to fully fund the 1992 reform act, which is being phased in over five years. The 1992 act replaces the old system that was declared unconstitutional in 1993 by the state supreme court.[101] The legislature also authorized adjustments in the state-aid formula for districts with rapid enrollment increases.[102]

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[94] 1993 N.J. Adv. Leg. Serv. 102.

[95] *See* 1993 N.Y. Adv. Leg. Serv. 57; 1993 N.Y. Adv. Leg. Serv. 260.

[96] 1993 Okla. Resolution 1007. In February 1994, voters turned down the proposed amendment. *News in Brief*, XIII EDUC. WK. 21, Feb. 16, 1994, at 15.

[97] M. Sommerfeld, *Oregon Voters Defeat Tax Hike for Schools*, XIII EDUC. WK. 11, Nov. 17, 1993, at 11.

[98] 1993 Pa. Adv. Leg. Serv. 1A.

[99] 1993 Pa. Adv. Leg. Serv. 16.

[100] 1993 Tenn. Adv. Leg. Serv. 190.

Under pressure of a court ruling, the **Texas** legislature in May 1993 enacted a law to reduce funding disparities between the richest and poorest school districts by requiring those with more than $280,000 in property wealth per student to select one of five options for redistributing their wealth to poorer districts. The options include voluntarily consolidating with other districts; shifting taxable commercial and industrial property to the tax rolls of another district; merging tax bases with another district; purchasing "attendance credits" from the state, which will allow money from rich districts to be sent to poor districts; or contracting to educate students in other districts. The last three options require voter approval. If no local choice is made, the state will implement option two and shift commercial and industrial property from one set of tax rolls to another.[103]

Texas voters had previously rejected a constitutional amendment authorizing regional property-tax sharing and a state-level property tax. The new legislation was upheld by a state court even though it allows approximately a $600 per pupil gap between the wealthiest and least affluent school districts.[104] In spite of the new law, figures suggest that the school finance budget falls about $500 million short of what is needed to maintain the current per pupil expenditure, given enrollment increases. And the finance measure also requires a higher local property tax rate to garner the same amount of state aid as was previously available.[105]

Utah modified its capital equalization law (its so-called Robin Hood law) in response to outcries from fast-growing school districts who wanted to keep more of their property tax revenues for their own capital needs. The revised measure drastically lowers the property tax millage subject to equalization and extends the phase-in period for the revised mill rates.[106] The modification was tied to a scheme to raise funds for building construction by cutting sales tax exemptions during the 1994 legislative session.

In an attempt to hold down local property tax increases, **Wisconsin** passed a measure limiting salary and benefit increases of municipal employees, including teachers. The cost controls are imposed for five years, limiting raises to 2.1%.[107] According to *Education Week*, the effect will be to limit average spending increases to $190 per student for the 1993-94 school year.[108]

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[101] P. Schmidt, *School-Finance System in Tenn. is Struck Down*, XII EDUC. WK. 27, March 31, 1993, at 1, 22.

[102] 1993 Tenn. Adv. Leg. Serv. 481.

[103] 1993 Tex. Adv. Leg. Serv. 347.

[104] L. Harp, *Tex. Finance Ruling Angers Both Rich, Poor Districts*, XIII EDUC. WK. 16, Jan. 12, 1994, at 18.

[105] L. Harp, *Impact of Tex. Finance Law, Budget Increase Gauged*, XII EDUC. WK. 38, June 16, 1993, at 18.

[106] 1993 Utah SB 199.

Governance

Last year's chapter reported on a number of states that made changes in the structure or the method of selection of state or local education boards or the role of the state board, among them Georgia, Hawaii, Illinois, Tennessee, Virginia, Kentucky, and Missouri. This year's report reflects more variety in the governance issues.

The 1993 **Iowa** legislature passed a measure allowing the same person to serve as both superintendent and elementary school principal in a school district.[109] This was a money-saving measure for small school districts.

The **Massachusetts** education reform law included provisions increasing the authority of principals to govern their own schools with the help of school councils made up of parents, teachers, and nonschool members. Principals are held accountable for school progress, and if the performance is substandard, the state can take over the local school. As part of the new law, the principal can dismiss any teacher, subject to review by the superintendent but no longer by the local school board.[110]

North Carolina lawmakers passed a measure, effective in 1995, that revokes the possibility of career status (tenure) for all newly hired principals. The superintendent's reasons for nonrenewal of a principal's contract must be provided in writing. If the principal appeals to the school board, the grounds for the nonrenewal must be demonstrated not to be "arbitrary or capricious, discriminatory, personal, or political."[111] These legislative changes are coupled with measures to train principals and create a leadership academy for administrators.[112]

In **Texas**, the legislature passed a stronger conflict of interest law, banning school boards from contracting with businesses in which a board member or member's spouse has a "significant" interest.[113] The earlier law was limited to disclosing the conflict and refraining from voting in a matter concerning it. In addition, Texas authorized the state education agency to accredit local school districts under the following classification scheme: exemplary, recognized, or warned. Sanctions are available for those districts receiving "warned accreditation" status, including hearings to notify the public, on-site investigations, improvement plan requirements, and appointment of a master to oversee the operation of the school district. On the other hand the legislation creates a kind of merit pay award (Successful Schools Awards) for schools that achieve meritorious academic progress. Regardless of their accreditation status, schools are required to issue annual reports (campus report cards) to parents indicating progress toward intended performance outcomes.[114]

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[107] 1993 Wis. Adv. Leg. Serv. 16.

[108] *Legislative Update*, XII Educ. Wk. 40, August 4, 1993, at 33.

[109] 1993 Iowa SF 4.

[110] 1993 Mass. Adv. Leg. Serv. 71.

[111] 1993 N.C. Adv. Leg. Serv. 210.

[112] 1993 N.C. Adv. Leg. Serv. 321; 1993 N.C. Adv. Leg. Serv. 553.

[113] 1993 Tex. Adv. Leg. Serv. 964.

In addition to the above states, both **Missouri** and **Washington** adopted measures, described previously in the accountability subsection, that give the state board a role in investigating or managing schools whose students are not performing at an acceptable level.

Home Schooling

Last year South Carolina's home schooling revisions were cited in the *Yearbook*. This year **Arizona** enacted a law loosening the controls over home schools. Previously, county school superintendents could order home-schooled students back into public schools if their academic progress was deemed insufficient. Under the new legislation, however, home-schooled students need only take and pass a nationally standardized, norm-referenced test every three years. Limited English Proficient (LEP) students and students with disabilities may be exempted from those portions of the test that would be detrimental to the student because of his or her condition. Furthermore, an independent party rather than the school district may administer the test to the student. Another significant change eliminates the requirement that home-school teachers pass the same basic skills test as required of teacher certification applicants.[115]

Interagency Collaboration

An area continuing to receive attention is interagency collaboration to serve the multiple educational, health, and social service needs of students at risk, including students with disabilities. A number of states already have efforts underway to deliver coordinated interagency services, with the school as the central point for the identification of needs.

Massachusetts has authorized an interdisciplinary health, education, and human service discretionary grant program with funds from the Health Protection Fund. The program is to involve parents in the development of grant projects. A separate provision calls for a plan to earmark 1%-2% of the budgets of the departments of Mental Retardation, Mental Health, Social Services, and Youth Services for services delivered in school-based centers.[116]

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[114] 1993 Tex. Adv. Leg. Serv. 347.

[115] 1993 Ariz. Adv. Leg. Serv. 83.

The **Rhode Island** legislature directed state officials to design a plan to create "child opportunity zones" at or near schools. The education system is to coordinate the delivery of comprehensive social, health, and educational services to students and their families in those zones, with the help of other state agencies.[117]

In 1993 **Utah** expanded its pilot program of interagency services to children and youth at risk so that students in pilot schools in grades 4-6 could be served along with those in grades K-3. The legislature also created a state steering committee to enhance the efforts of the State Coordinating Council. In addition, the Office of Court Administration joined the Departments of Education, Health, and Human Services on the Council. Within local school districts, local interagency councils are to provide interdisciplinary staff and services for students at risk who need services from more than one agency. The act has a 1997 sunset provision.[118]

Length of School Year

As noted in last year's *Yearbook*, Kansas lengthened its school year in 1992, following a trend established by Minnesota and Oregon in 1991.

As part of a major reform package, the **Michigan** legislature added 180 instructional hours to the current 180-day, 900-hour school year. The new hours are to be staged in by 2000 at a suggested rate of two days per year, although it would appear impossible to achieve the 180-hour total at that rate without also increasing the length of the school day. The legislature expressed its intent to have 210 school days per year by the 2009-2010 school year.[119]

Minnesota also established a plan to lengthen its school year by two days per year until the length of the school year reaches 190 days in the school year 2004-05.[120]

Texas created a state-funded extended school year program of thirty days for those students in grades K-8 who are likely not to be promoted to the next grade level. Under the program, if a student attends 85% of the summer classes, the student will be promoted unless the parent

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116. 1993 Mass. Adv. Leg. Serv. 731.

117. 1993 R.I. Adv. Leg. Serv. 465.

118. 1993 Utah Adv. Leg. Serv. 12.

119. 1993 Mich. HB 5121. The reader can note that a 180-day, 900-hour school year results in a five-hour school day.

120. 1993 Minn. Adv. Leg. Serv. 224.

objects after being informed of the problems that accompany retention. The program is an attempt to eliminate district retention policies.[121]

Merit Pay

Merit pay for teachers has not proved to be a particularly popular idea across the states. In its place, some states have adopted measures tying financial rewards to improved student performance on a schoolwide basis. During 1993, both **Indiana** and **Texas** created such schoolwide financial incentives (see the subsections on accountability and governance).

Miscellaneous

As a part of the **Massachusetts** reform law, state employees may volunteer up to seven hours a week, at times approved by their supervisors, in the public schools without loss of salary. The time spent need not be related to the needs of their own child.[122] The 1993 **Texas** legislature enacted a measure specifying that if a local school district operates a fleet of over fifty motor vehicles for transporting students, at least 50% of the fleet must be capable of using compressed natural gas or other alternative fuels by September of 1997. The standard rises to 90% by September of 2001. Districts are exempt, however, if they solicit but do not receive bids that save money over the current fuel costs.[123]

Utah lawmakers enacted clarifying legislation allowing schools to teach about political or religious thought and their influence on such disciplines as art, music, literature, history, law, and politics so long as the instruction is for "secular educational objectives." The measure specifies that no "aspect of cultural heritage, political theory, moral theory, or societal value" shall be excluded or included in the curriculum primarily because it affirms or denies a religious belief.[124]

Multicultural Education

Florida and Nebraska enacted programs of multicultural studies during 1992. In 1993 **Connecticut** required its new eleven state regions to introduce plans to make students aware of diversity.[125] **Michigan** enacted a measure encouraging but not requiring school districts to implement multicultural education in all grade levels. If adopted, a multicultural curriculum must include studies of the contributions of African Americans, Native Americans, and Asian Americans.[126] **Minnesota** lawmakers created a Multicultural Education Advisory Committee and charged it with developing recommendations for multicultural learner outcomes, grants for professional development to recruit teachers of color, and other methods of furthering "inclusive, multicultural" education.[127]

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[121] 1993 Tex. Adv. Leg. Serv. 347.
[122] 1993 Mass. Adv. Leg. Serv. 71.
[123] 1993 Tex. Adv. Leg. Serv. 347.
[124] 1993 Utah Adv. Leg. Serv. 95.
[125] 1993 Conn. Adv. Leg. Serv. 263.

Parent Outreach and Involvement

The topic of parent involvement continued to be the subject of legislation in 1993. Iowa and Minnesota were singled out for attention in last year's *Yearbook*.

In 1993 **South Carolina** passed a measure requiring the state board of education to develop parental involvement programs for parents of 4th-8th graders. Among the components of the program are provisions for regular school visits, training sessions on discipline, homework, communication techniques, standardized testing, and literacy.[128]

Several states are writing into their accountability plans requirements that school districts issue annual school reports to parents on such matters as personnel, budgeting, and student performance indicators. Reporting requirements in **South Carolina**, **Texas**, **Washington**, and **Wisconsin** have been mentioned in earlier sections of this chapter. In addition, parental involvement programs remain key components in most early childhood programs (see early childhood section).

Privatization

New Mexico enacted a measure that allows the state department of education to contract with private, nonprofit agencies to serve students in grades 9-12 who are at risk of dropping out. Students are considered at risk if they fail three classes in the 9th grade. The state is to develop criteria for selection of private agencies that would establish alternative education programs for at-risk students.[129]

In a cryptic, one-line provision, the 1993 **Texas** legislature authorized the boards of local school districts to contract with either public or private entities for educational services.[130]

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[126] 1993 Mich. HB 5121.

[127] 1993 Minn. Adv. Leg. Serv. 224.

[128] 1993 S.C. Acts 135.

[129] 1993 N.M. Adv. Leg. Serv. 168.

[130] 1993 Tex. Adv. Leg. Serv. 347.

Sex Education

South Dakota in 1992 enacted a measure promoting sexual abstinence in its sex education courses. Several other legislatures joined suit in 1993. **Arkansas** legislation states that every public school with a sex education program must emphasize abstinence as the "only sure means" of avoiding pregnancy and sexually transmitted diseases such as AIDS.[131] **Louisiana** legislation is similar, and a 1993 amendment to its 1992 sex education statute requires that abstinence be the "major emphasis" of any public school sex education instruction, also adding that instructors must emphasize that abstinence between unmarried persons is the expected standard of all school-age children.[132]

Oregon legislators enacted a measure stating that sex education instruction shall promote and acknowledge the value of abstinence. The measure also specified that contraceptive and disease reduction measures are to be taught along with abstinence and that students having sexual intercourse are not to be devalued. Finally, the legislation requires instructors to teach that no form of sexual expression is acceptable when it physically or emotionally harms oneself or others.[133]

In contrast to the actions of governors in these states, **New Jersey**'s outgoing Governor Florio vetoed a measure that would have required teachers statewide to "stress" abstinence in sex education classes.[134] The measure became enmeshed in politics and antagonisms between the religious right and liberals, and the governor said it encroached on local decision making.

Sexual Harassment/Sexual Orientation Discrimination

Massachusetts enacted a measure outlawing discrimination against gay and lesbian students in the public schools. Under the new law, students who think they have been the victims of discrimination because of their sexual orientation can file civil rights lawsuits.[135] This law is thought to be the first of its kind in the nation.[136]

Michigan lawmakers passed a measure requiring schools to develop written policies prohibiting sexual harassment by pupils, employees, and school board members. The policy must be in effect by January 1, 1995 and must include penalties for offenders.[137]

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131. 1993 Ark. Adv. Leg. Serv. 1173.
132. 1993 La. Adv. Leg. Serv. 921.
133. 1993 Or. Adv. Leg. Serv. 775.
134. *News in Brief*, XIII EDUC. WK. 16, Jan. 12, 1994, at 16.
135. 1993 Mass. Adv. Leg. Serv. 282.
136. K. Diegmueller, *Mass. Approves Bill Outlawing Bias Against Gay Students*, XIII EDUC. WK. 15, Dec. 1, 1993, at 16.
137. 1993 Mich. HB 5121.

Site-based Management

Site-based management became popular in the 1980s and stresses the involvement of parents and teachers in decentralized decision-making at the building level. Many states have already incorporated site-based management into school reform laws. The so-called charter school is one form of site-based decision making. Others continue to emerge as well, such as those adopted in Hawaii and Tennessee in 1992.

In **Missouri**, as part of its 1993 reform law, a New Schools Pilot Project was instituted to select three school sites for a five-year pilot program to develop site-based management. Waivers will be available except with respect to the terms of teacher contracts.[138]

In a move designed to increase local accountability, the **Nevada** legislature required the state board of education to establish a pilot program to evaluate the feasibility of transferring the management of schools to administrators, faculty, and parents at the school itself. Ten schools are to be designated as part of the site-based pilot project.[139]

Utah legislators enacted legislation to promote site-based accountability and encourage strategic planning at the building level. The "Centennial Schools" legislation creates a three-year pilot program in which local public school parents and teachers can form a governing board, formulate goals and intended outcomes, and then negotiate with the district for autonomy under a site-based management scheme. Waivers from local board rules are conditioned on the agreement of the local bargaining unit, however. No waivers of state rules are provided. Both the local district board and the State Board of Education must approve each centennial school. Up to 200 such schools are authorized, with each receiving $5,000 as a base allocation, as well as $20 per enrolled student.[140]

Special Education

Last year's *Yearbook* reported the Iowa and New Hampshire attempts to address the financial problems associated with residential placements of students with severe disabilities. During 1993 **California** addressed the same problem by creating a pilot project for seriously emotionally disturbed students released from the Napa State Hospital. The project asks IEP and interagency review teams to assess the merit of public school programs accompanied by intensive foster care for these students.[141] In addition, California also specified that health facilities are no longer eligible for special education school status. The result will be to mandate local programs instead.[142]

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[138] 1993 Mo. SB 380.

[139] 1993 Nev. Adv. Leg. Serv. 667.

[140] 1993 Utah Adv. Leg. Serv. 182.

[141] 1993 Cal. Adv. Leg. Serv. 668 (Deering).

Similar cost problems produced **Massachusetts** legislation creating a study commission, whose report was due by December of 1993, to assess the services and associated costs of special education and to assess the need for additional state aid to school districts. The commission was also to study alternate methods of cost sharing for medical and other related services and to determine the feasibility of using human services department representatives in IEP meetings as a means to avoid out-of-district placements.[143]

Pennsylvania increased its special education weightings per disability category to replace the 1990 weightings. The effect was to pump new money into special education services. Additionally, in a controversial decision, the legislature continued to appropriate money ($76 million) to fund approved private schools that educate students with disabilities.[144]

Teacher Certification and Evaluation Requirements

Legislative sessions in 1992 in California, Indiana, Louisiana, and Minnesota produced teacher certification or evaluation measures mentioned in last year's *Yearbook*. This year **Illinois** created a Teacher Corps to provide an alternative certification for experienced professionals. The state board of education is to help local school districts and higher education institutions implement the system. Those with five years of professional experience in the area in which they wish to teach may take a six-week intensive summer program as part of an M.Ed. program in which they must be enrolled. If they also earned a grade point average of at least 3.0 as an undergraduate and pass a test of basic skills, they may receive an alternative teaching certificate.[145]

Michigan lawmakers instructed the state board of education to develop "fast-track" teacher preparation programs for outstanding prospective teachers and encourage higher education institutions to adopt them. It also required that for the first three years of teaching, a teacher must be assigned a mentor and receive "intensive professional development induction" into the teaching profession. It also allowed school boards to appoint administrators who lack an administrator's certificate, although the administrators must meet continuing education requirements.[146]

As a cost-saving and professional development measure, **Minnesota** adopted a plan whereby first-year teachers may be hired to serve one-

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142. 1993 Cal. Adv. Leg. Serv. 939 (Deering).
143. 1993 Mass. Adv. Leg. Serv. 71.
144. 1993 Pa. Adv. Leg. Serv. 16.
145. 1993 Ill. Adv. Leg. Serv. 204.
146. 1993 Mich. HB 5121.

year "residencies" at salaries below those of other teachers. The "residents" are to be mentored by licensed teachers and are not to have supervisory classroom responsibilities in excess of 80% of the instructional time required of regular teachers. The residency counts one year toward the required probationary period for new teachers. Also, the legislature instructed the state board of education to develop outcome-based rules on teacher licensure that are clearly related to inclusive instructional strategies and the new results-oriented graduation rule scheduled for implementation in 1996.[147]

Texas enacted a measure providing for loans of noncertificated teachers to schools for one year by business enterprises. Under such circumstances, the business pays the salary of the teacher.[148]

The **Wyoming** legislature adopted a measure allowing teacher certification standards to be set by the formerly advisory Professional Teaching Standards Board. Of the thirteen members on the Board, five will be public school teachers and a sixth will be an auxiliary professional staff person. The state superintendent appoints the Board members.[149]

Teacher Rights

In 1992 Alaska and New Mexico addressed teacher bargaining rights that were described in last year's *Yearbook*. In 1993 a number of states took action that modified teacher rights in the employment process.

Massachusetts reduced the seniority rights of teachers with professional status (tenure), allowing such teachers to less easily "bump" junior teachers when a reduction in force or school reorganization takes place. Moreover, a "just caûse" standard for firing teachers was established; among the just causes is failure to satisfy teaching performance standards. Principals rather than local school boards now have the authority to fire teachers, subject to review by the superintendent. Review of the dismissal is by an arbitrator selected from a listing provided by the American Arbitration Association. Massachusetts also now requires written notice of, and written reasons for, terminating all teachers who have been employed over ninety days.[150]

Michigan enacted a law that moves the probationary period for new teachers from two years to four years, accompanied by annual evaluations. It limits to three years the right of teachers to be rehired after they are laid off.[151] Under a companion measure, if a school district wishes to fire or demote a teacher, an administrative law judge rather than the

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147. 1993 Minn. Adv. Leg. Serv. 224.
148. 1993 Tex. Adv. Leg. Serv. 347.
149. 1993 Wyo. Adv. Leg. Serv. 217.
150. 1993 Mass. Adv. Leg. Serv. 71.
151. 1993 Mich. Adv. Leg. Serv. 59.

local school board will hear evidence against the teacher and make a preliminary decision. Appeal is to the Tenure Commission and ultimately to a state appeals court.[152] The measure is expected to reduce the legal costs attached to teacher firings.[153]

In contrast to Massachusetts, **West Virginia** passed a measure that overturned a court ruling and requires that teacher reductions be based solely on seniority and not on a combination of qualifications and seniority.[154]

Wyoming passed a law requiring annual performance evaluations and requiring that school districts give written reasons for firing initial-contract (nontenured) teachers.[155]

Technology Initiatives

Last year's *Yearbook* described educational technology initiatives in Georgia, Kentucky, and Ohio. By way of update, **Kentucky** this year lifted a cap on funds for consultants from $1 million to $10 million for the remainder of the biennium. The consultants are to address both administrative and nonadministrative components of the technology system. A portion of the money is for help with purchasing decisions; another portion is for development of network connections between each local school district and appropriate state agencies. The consultants are also to help with teacher training. Release of the money was coupled with a switch of oversight responsibilities from the state department of education to the State Finance and Administration Cabinet.[156] Also by way of update, **Georgia** added some $63 million from lottery funds to its educational technology initiative.[157]

Florida took more than $16 million from the general fund and $38.9 million from the lottery fund for a public school technology enhancement initiative. Incentive awards are to be made available to local school districts to distribute to individual schools based on joint submissions from principals and school advisory councils. Thirty percent of a school's grant must go for teacher training.[158]

A 1993 **Massachusetts** law calls for a statewide educational technology plan to integrate technology into teaching and learning at all levels. Among the plan's requirements are distance learning strategies, campus computer links with public schools, and professional development efforts.[159]

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[152] 1993 Mich. Adv. Leg. Serv. 60.

[153] *News in Brief*, XII Educ. Wk. 39, June 23, 1993, at 29.

[154] 1993 W.V. Adv. Leg. Serv. 48.

[155] 1993 Wyo. Adv. Leg. Serv. 219.

[156] 1993 Ky. Adv. Leg. Serv. Ex. Sess. 3.

[157] 1993 Ga. Adv. Leg. Serv. 608.

[158] 1993 Fla. Adv. Leg. Serv. 184.

[159] 1993 Mass. Adv. Leg. Serv. 71.

New Mexico lawmakers appropriated $3.5 million for a statewide literacy effort relying on a computer-based language-arts program. Equipment would be distributed to districts across the state. Any elementary school may apply for a grant, but the legislature specified that the writing-to-read program should be used and should be implemented initially in kindergarten and the first grade.[160]

The **North Carolina** legislature created and funded a Commission on School Technology to develop a "basic level of learning and instructional management technology" for every school in the state. A final report from the Commission is due on May 15, 1994.[161]

Tennessee appropriated $36.9 million for technologically advanced "21st Century Classrooms" and $11.2 million under its Basic Education Program for a computer network linking the state education office with all principals. Distribution of the funds to local school districts is to be guided by a plan developed by a state commission and approved by the Tennessee Board of Education and the Information Systems Council.[162]

Washington State appropriated $4.6 million for the development of a K-12 educational technology plan. Recommended legislation for a grant program was due by December 1993.[163]

Vouchers and Choice/Open Enrollment Plans

Oregon voters rejected vouchers in 1990, Colorado in 1992, New Mexico and California in 1993. In addition, the 1993 Maryland legislature killed the governor's plan for 200 vouchers to Baltimore students, and the Illinois legislature defeated a broader measure that would have given parents a $1,000 credit toward any public or private school in the state. On the other hand, **Wisconsin** extended its Milwaukee voucher program, to allow 1.5% of students to attend private school on public vouchers by 1994-95. Concurrently, it raised the percent cap of public school voucher students in private schools from 40% to 65%.[164]

As an alternative to private school voucher plans, many states have introduced public school choice options. Perhaps helping to defeat the voucher referendum in **California** was legislation enacting two public-school choice laws. One provided for intradistrict open enrollment policies.[165] The other created a pilot project for interdistrict student transfers, allowing local districts to set limits on the numbers of transfers to be accepted.[166]

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[160] 1993 N.M. Adv. Leg. Serv. 366. An issue has since erupted as to whether the phrase "writing-to-read" is a generic reference to a type of program or a specific reference to IBM's Writing-to-Read program. *See Writing to Confuse?*, XIII EDUC. WK. 10, Nov. 10, 1993, at 16.

[161] 1993 N.C. Adv. Leg. Serv. 321.

[162] 1993 Tenn. Adv. Leg. Serv. 535.

[163] 1993 Wash. Adv. Leg. Serv. 24.

[164] 1993 Wis. Adv. Leg. Serv. 16.

[165] 1993 Cal. Adv. Leg. Serv. 161 (Deering).

Stopping short of mandating school choice, the **Massachusetts** legislature nonetheless expanded its interdistrict choice options. Under the expanded plan, up to 1% of total students enrolled may exercise the choice option during the 1994 school year, 1.5% during 1995, 1.75% during 1996, and 2% during the 1997 school year.[167]

Workforce Development Programs

Indiana, Iowa, and Tennessee enacted 1992 provisions, reported in last year's *Yearbook*, aimed at encouraging a better transition from school to work opportunities. During 1993, **Illinois** followed suit by encouraging the state board of education to establish a youth apprenticeship vocational education program for secondary students. The legislature wants to see academic credit for work-related training at manufacturing facilities or for agency training.[168] The July budget law even contained a measure providing state tax credits for manufacturing businesses offering tech-prep and vocational programs to youth.[169]

Maine set aside $3.9 million as incentive money for schools that introduce school-to-work, youth apprenticeship, and new technology programs. Its jobs-oriented programs are to build on the "Jobs for Maine's Graduates" program, which is authorized to provide services and assist the private sector to develop youth apprenticeship systems.[170]

The **Nevada** legislature instructed the State Board of Education to establish apprenticeship programs allowing 11th and 12th graders to serve business internships for academic credit.[171]

Wisconsin expanded its youth apprenticeship initiatives and created an Office of Workforce Excellence. The Office is to coordinate the apprenticeship initiatives and implement training grants for employers who provide on-the-job training to youth. The law expires after June 30, 1997.[172]

Washington funded a $1.8 million initiative to help secondary schools develop model programs for school-to-work transitions. Model programs are to find ways to integrate vocational and academic content into a single curriculum, to foster partnerships with business, and to stress increased vocational guidance and counseling, among other things.[173]

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166. 1993 Cal. Adv. Leg. Serv. 160 (Deering).
167. 1993 Mass. Adv. Leg. Serv. 71.
168. 1993 Ill. Adv. Leg. Serv. 270.
169. 1993 Ill. Adv. Leg. Serv. 505.
170. 1993 Me. Adv. Leg. Serv. 348.
171. 1993 Nev. Adv. Leg. Serv. 404.
172. 1993 Wis. Adv. Leg. Serv. 16.
173. 1993 Wash. Adv. Leg. Serv. 24.

Conclusion

Aside from the National and Community Service Trust Act of 1993 and conversion of the Federal Direct Student Loan Demonstration Program into a permanent program, 1993 was a quiet year in terms of national education legislation. The 1994 calendar year is expected to be far different.

Among the trends in 1993 state reform efforts in public education were continuing efforts to reduce funding inequities between wealthy and poor school districts, more outcome-based instruction and statewide assessment systems, choice options of one sort or another, and expanding educational technology initiatives. Also, 1993 saw increased attention to issues of violence and crime control in the schools, sexual abstinence as part of sex education programs, school-to-work programs, early childhood development programs, and interagency collaboration to serve students at risk. What cannot be captured by the chapter are significant actions and innovations introduced by state and local boards of education, the rate of implementation of previously enacted reforms, and the extent of budgetary dilemmas in various states.

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